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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,
vs. *Petitioner,*
AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
a corporation of Illinois,
vs. *Petitioner,*
AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

Petition for writs of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and brief in support thereof.

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Respondent.

Petition for writs of certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit, and brief in support thereof.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Anchor Serum Company, hereinafter called Petitioner Anchor, and the Petitioner, Illinois Farm Bureau Serum Association, hereinafter called Petitioner Illinois, each jointly and separately pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Seventh Circuit, filed and rendered March 4, 1946 (R. 1247 to 1269, incl.), which judgments became final by the overruling of Petitioners' joint petition for rehearing on the 3rd day of April, 1946 (R. 1347) by which final judgment, the judg-

ment of the District Court of the United States for the Northern District of Illinois, Eastern Division, was affirmed as to $13,347.93 and reversed as to the remainder (R. 1247 to 1269, incl.). Mandates have been stayed to give Petitioners an opportunity to apply to this Court for Writs of Certiorari (R. 1351). Petitioners are jointly interested in the judgments and join in this Petition pursuant to Rule 48 of this Court.

STATUTE RELIED UPON TO SUSTAIN THIS COURT'S JURISDICTION.

Petitioners rely upon the provisions of Sec. 240 of the Judicial Code, 28 U. S. C. A., Sec. 347, to have Writs of Certiorari granted and to sustain the jurisdiction of this Court.

FEDERAL STATUTES NECESSARY TO BE CONSTRUED.

This case presents to this Court a highly important construction of the provisions of the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act of 1935, hereinafter for brevity referred to as the Serum and Virus Act. This Act was an amendment to the Agricultural Adjustment Act. This Act is found in 7 U. S. C. A., Secs. 851 to 855, incl. Sub-sections (6), (7), (8) and 9 of Sec. 608a and Sub-sections (7), (14) and (15) of Section 608c of 7 U. S. C. A. are made applicable in connection with orders issued. It also made Sec. 608d of 7 U. S. C. A. applicable in connection with the Marketing Agreement and Orders of the Secretary issued. Sub-sections (a), (b), (2), (c), (f), (h) and (i) of Sec. 610 of 7 U. S. C. A. were made applicable to the administration of the Act. These Sections are set out in full in the Appendix.

SUMMARY AND SHORT STATEMENT OF THE CASE.

NATURE OF THE CASE.

This action was brought in the District Court to recover triple damages under the Anti-Trust laws and, particularly, for alleged and purported violations of the Robinson-Patman Act. (R. 63 to 69, incl., R. 2 to 11, incl.).

SOME OF THE MATERIAL FACTS OF THE CASE.

The Respondent is a cooperative association organized under the laws of Iowa and engaged in the manufacture and distribution of serum and virus. Petitioner Anchor is a Missouri corporation engaged in the manufacture and distribution of serum and virus and other products. Petitioner Illinois is a cooperative association organized under the laws of Illinois and engaged in the distribution of serum and virus "to its members" within the state of Illinois only.

On December 2, 1936, the handlers and manufacturers of serum and virus entered into a Marketing Agreement by and with the approval of the Secretary of Agriculture, hereinafter referred to as the Secretary. On the same date the Secretary promulgated an Order regulating the industry (R. 663 to 692, incl.). At the same time there was created a Control Agency to administer the Act, the Order and the Marketing Agreement (R. 668 to 671, incl., 681 to 684, incl.).

Thereafter, the different handlers and manufacturers of serum filed their postings as to prices, terms of sale and discount with the Secretary and with the Control Agency, including Petitioner Anchor and Respondent and its assignor (R. 693 to 699, incl., 265, 266, 269 to 271, incl., 779 to 783, incl.). During all the period of time in question Petitioner Anchor had filed postings for sale to all four

classes of purchasers; volume contract purchasers, wholesalers, dealers and consumers (R. 693 to 699, incl.). In Petitioner Anchor's postings as to terms of sale, from December 14, 1936 to July 16, 1939 there was contained the following:

"We also spend liberal allowances for advertising and sales promotion work."

In Petitioner Anchor's postings effective July 16, 1939, and all postings thereafter, this was eliminated (R. 695 to 699, incl.). After that time Petitioner Anchor spent no allowances for advertising and sale promotion work to Petitioner Illinois (R. 158, 306, 587, 594, 595). Petitioner Anchor's postings and filings at all times remained in full force and effect (R. 522, 523).

During all the time in question Petitioner Illinois was a volume contract purchaser and was so bulletined by the Control Agency to the trade (R. 273, 521). It was the only volume contract purchaser in this territory, and the only one with whom Petitioner Anchor dealt. (R. 140, 166).

From December 16, 1936 to May 27, 1937, Respondent's assignor, American Serum Company, had postings for sale at 75¢ per 100 ccs. to consumers and 63¢ per 100 ccs. to dealers (R. 265, 266, 779, 780). From June 7, 1937 to August 29, 1939, Respondent had postings for sale only to consumers at 75¢ per 100 ccs. (R. 269, 270, 780, 781). Respondent at no time was authorized to sell to volume contract purchasers, wholesalers or dealers (R. 674, 687, 271, 693 to 699, incl., 780 to 783, incl.).

Petitioner Illinois agreed with Petitioner Anchor to carry on advertising, educational and promotional work (R. 562 to 654, incl.). From December 1936 until July 1, 1937, Petitioner Anchor paid Petitioner Illinois for this

purpose an allowance of .04 per 100 ccs. Between July 1, 1937 and March 25, 1938, it paid an allowance of .08 per 100 ccs. (R. 132 to 134, incl., 139). From March 25, 1938 to July 15, 1939, an allowance of .13 per 100 ccs was made. After July 15, 1939, no further allowances were made or paid (R. 158, 306, 587, 594, 595).

Petitioners' Illinois membership during the period of time in question consisted of all the County Farm Bureaus in Illinois, whose membership ranged from 64,000 to 75,000 (R. 403, 511, 441). Such County Farm Bureaus, during this period, sold serum only to from 19,000 to 20,000 of their farmer members (R. 403). During the period in question there were over 160,000 farmers in Illinois raising hogs (R. 485). With the exception of the parties hereto, there were at least forty (40) other competitors selling serum (R. 362).

During the period in question Petitioner Illinois performed its agreement with Petitioner Anchor and advertised the serum in the statewide publication known as Illinois Agricultural Association Record and the county publications of the county units, neither of which accepted advertising from outside sources (R. 440, 441, 558, 559). Between 80,000 and 85,000 of these publications were circulated among members of the Illinois Agricultural Association and the different County Farm Bureaus. The publicity department of the Illinois Agricultural Association would give news releases pertaining to serum to daily and weekly newspapers, press associations and radio stations. Additional instructions were given at statewide meetings, district meetings, township meetings and group meetings. Demonstrations as to how to care for, vaccinate and treat swine were held. The farmer members of the county farm units would teach each other. Petitioner Illinois designed

and produced a sound motion picture entitled "Swine Insurance", showing the necessity of and the proper method to treat hogs with serum, both before and after vaccination. This picture was shown at different public meetings and at different clubs (R. 564 to 566, incl., 511 and 581).

Petitioner Illinois sold serum only to its member County Farm Bureaus, who sold serum only to farmers and consumers who were members of the Farm Bureaus (R. 401, 461, 468, 168, 580, 583, 584, 586, 403, 404, 406, 435, 414). Not to exceed two percent (2%) of its sales might have been made through error to former members who were not in good standing (R. 580, 583, 584, 468). Petitioner Illinois never sold serum to drug stores (R. 580).

Respondent admittedly was not soliciting or trying to sell the members of Petitioner Illinois (R. 280).

Respondent in making the sales in Illinois at a less price than its posted price violated the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement (Par. B, Sub-section 7, sec. 608c, 7 U. S. C. A., Par. 3, Sec. 1, Article IV of both the Order and Marketing Agreement, R. 674, 687), and subjected itself to a fine of from $50. to $500. for each offense under the provisions of Sections (14) and (15) of Sec. 608c of 7 U. S. C. A. It is the alleged difference between its posted price and what it alleges and claims it sold its serum to consumers upon which it bases its damages. This is the only alleged and purported damage for which Respondent sues to recover (R. 372, 63 to 69, incl.).

Respondent's President after denying that it reduced its sales price or gave any credits outside the state of Illinois, admitted that in some towns in Iowa it gave credits for veterinarians employed to go out and help farmers vaccinate and administer the serum, which the Respondent's

President called "Sales Expense" (R. 356 to 360, incl., 373 to 375, incl.).

Petitioners were denied the right to prove that Respondent's sales in Illinois increased from 2,523,625 ccs. in 1937 to 4,167,125 ccs. in the fiscal year from March 1, 1939 to February 29, 1940 (R. 618).

In twelve (12) of the thirty-five (35) towns in Illinois where Respondent claimed it was required to reduce its selling price, there was not located any office of the Farm Bureau or county unit members of the Petitioner Illinois (R. 411 to 413, incl.). In the fifteen (15) counties where Respondent admits it did not reduce its prices, the Farm Bureau was represented in each county and had offices in six (6) of the same towns (R. 407).

It was admitted by Respondent's President that during the year of 1936 the Illinois Farm Bureaus were selling serum at 65¢ per 100 ccs. and that during all the times in question they sold serum to their members at 65¢ (R. 285).

Petitioner Anchor was denied the right to plead and prove that in July 1939 the Control Agency filed a complaint against Petitioner Anchor, involving the same matters of which complaint is made herein, and that said complaint was dismissed by the Secretary because notice that said allowances were made was included in the publicly filed price list of Petitioner Anchor, and that the practice of spending liberal allowances for advertising and sales promotion work was acquiesced in by the Control Agency and indulged in by other members of the industry without complaint being filed by the Control Agency, and when complaint was made, Petitioner Anchor revised its postings to conform to the objection (R. 530, 531, 97, 98, 115).

Respondent offered no evidence whatsoever with any probative force or effect that the acts, of which complaint is made, required or necessitated Respondent to reduce the selling price of its serum. Respondent's President testified that when he learned the Farm Bureaus were selling at 65¢, he instructed Respondent's warehousemen to reduce their price to meet the competition because Respondent couldn't get more than that (R. 242, 243). Respondent's President admitted that prior to the Marketing Agreement the industry was demoralized and Respondent could not sell its serum for 75¢ (R. 283).

Respondent's Assistant Sales Manager, Davis, testified that their druggists complained and Respondent reduced its selling price (R. 293, 294). Davis admitted on cross examination that he had never talked with a single one of Respondent's customers and that all he knew about it was that the druggists told him (R. 315).

Both witnesses, Huff and Davis, testified that during all the times in question they sold part of their serum in Illinois at 75¢ (R. 279, 280, 315, 316). Respondent's witnesses did not know whether they had ever sold any serum to members of the Illinois Farm Bureau (R. 316). No other evidence even of a hearsay and opinionated nature on this question was offered by Respondent.

VERDICT OF JURY FOR PETITIONERS.

The trial court held and instructed the jury as a matter of law, over both of the Petitioners' objections and exceptions, that the acts of these Petitioners, of which complaint is made, were unlawful and in violation of the Robinson-Patman Act (R. 633 to 636, incl.).

The court submitted the case to the jury upon two questions only, namely:

1. Was the Respondent damaged as the result of the Petitioners' violation of the Robinson-Patman Act?

2. If so, the amount the Respondent was so damaged. (R. 636 to 640, incl.).

The jury found the issues for the Petitioners, finding that the Respondent had not been damaged by the acts of the Petitioners (R. 1163).

JUDGMENT OF THE DISTRICT COURT.

The District Court sustained the Respondent's motion for a judgment notwithstanding the verdict and assessed the Respondent's damage at the highest amount claimed and asserted by the Respondent under its evidence and rendered judgment in triple of said amount in the sum of $17,666.10 and in addition thereto an attorney fee of $2500. In the alternative, the District Court decreed that if this ruling was held to be error that the District Court then would sustain Respondent's motion for a new trial. (R. 641, 1165, 1166).

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals appears in 153 Fed. (2d) 907 to 918, incl. It appears in the record 1247 to 1267, incl. The judgment of affirmance was rendered by a divided court (R. 1247 to 1269, incl.).

Circuit Judge Major, in his dissenting opinion, held that Respondent's evidence, upon which both the judgment of the District Court and the judgment of affirmance of the majority of the Circuit Court of Appeals was based, was not only hearsay but was hearsay heaped upon hearsay and was perhaps inadmissible for any pur-

pose and certainly not that for which it was offered, and that a verdict should have been directed for your Petitioners (153 Fed. (2d) 915 to 917, incl.) (R. 1259 to 1263, incl.). Judge Major, further in his dissenting opinion, held that if he be in error in that conclusion that the evidence presented an issue of fact for a jury's determination; that on this question the case was properly submitted to the jury and that the jury's answer should have been accepted; and that the District Court's action in entering a judgment notwithstanding the verdict was erroneous and should be reversed (153 Fed. (2d) 917 to 918, incl.) (R. 1263 to 1267, incl.).

QUESTIONS PRESENTED.

I.

EXEMPTION FROM THE ANTI-TRUST LAWS.

After the members of the industry, pursuant to the provisions of the Serum and Virus Act, entered into a marketing agreement, by and with the approval of the secretary, and after the secretary promulgated his order regulating the industry, and after the control agency was established to assist and administer the act, the order of the secretary, and the marketing agreement, and after the members of the industry filed their postings of prices, terms of sale and discount, and after the industry started operation under the act in question, were or were not the members of the industry exempt and immune from the provisions of the Anti-Trust Laws

(a) Were the members of the industry while so operating, in the event of violations of the Serum and Virus Act, the order of the secretary and the marketing agreement, subject to the penalties and liabilities imposed by the Anti-Trust Laws in addition to the penalties and liabilities imposed by the Serum and Virus Act?

II.

DENIAL OF DUE PROCESS OF LAW.

Did the action of the majority of the Court of Appeals, in affirming the judgment of the Trial Court in setting aside the verdict of the jury in favor of petitioners and rendering judgment N.O.V. in favor of respondent, based entirely upon hearsay and opinionated evidence without any direct evidence whatsoever that the acts of which complaint is made damaged respondent, deprive these petitioners of their property without due process of law?

III.

DENIAL OF TRIAL BY JURY.

Were petitioners by the action of the majority of the Court of Appeals deprived of their constitutional right of trial by jury?

IV.

DEPARTURE FROM USUAL JUDICIAL PROCEDURE BY LOWER COURT.

Is not the opinion of the majority of the Circuit Court of Appeals, in holding that Section 13(b) of Title 15 U. S. C. A. has changed the long and well settled rules of this nation in actions at common law with reference to burden of proof and especially in an action to recover under high penal statutes such as triple damages under the Anti-Trust Laws, such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

V.

UNCLEAN HANDS.

Is not respondent guilty of coming into court with unclean hands when it sues to recover diminished sums it failed to receive in sales of serum below its posted prices on file with the secretary and the control agency and made in violation of the Serum and Virus Act, the order of the

secretary and the marketing agreement, which violation under the Serum and Virus Act, and particularly subsections (14) and (15) of Section 608c, Title 7 U. S. C. A. subjected it to a fine of not less than $50 nor more than $500 for each sale?

VI.

CONCLUSIVENESS OF SECRETARY'S PREVIOUS RULING.

Is not the ruling of the secretary, dismissing the complaint filed by the control agency against petitioner Anchor involving the same matters of which complaint is made herein, because the fact that allowances were spent by petitioner Anchor was contained in its publicly filed sales or price list and because such practice was acquiesced in by the control agency and also indulged in by other members of the industry and after objections were offered, petitioner Anchor changed its price list to conform to the objection, binding on all the parties hereto, as the secretary was given under the Serum and Virus Act, exclusive powers to regulate and control the industry, with the members of the industry given the right of having the secretary's rulings reviewed by the courts?

VII.

RIGHT OF COOPERATIVE ASSOCIATION TO SUE FOR AND RECOVER DAMAGES SUSTAINED BY ITS MEMBERS.

Can a cooperative association sue to recover alleged damages which have been sustained only by its members and not by itself?

VIII.

COLLATERAL ATTACK UPON PETITIONER ANCHOR'S POSTINGS.

Can respondent recover in the case at bar without collaterally attacking the legality of petitioner Anchor's postings and filings as to prices, terms of sale and discount

which, under the adjudicated cases of this court, is forbidden?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS.

1. The question as to whether petitioners were or were not exempt from the penalties and liabilities of the Anti-Trust Laws presents an important question of federal law which has not been, but should be, settled by this court.

   (A) This exemption or immunity question should be settled and set at rest so that the members of the serum and virus industry may definitely know what exemptions and immunities from the Anti-Trust Laws were or were not granted by the Serum and Virus Act.

   (B) A final adjudication of this question is of equal importance to all those who are operating under any order of the secretary and marketing agreement promulgated, made and entered into pursuant to the Agricultural Marketing Agreement Act of 1937.

   (C) This presents a question of law of general national interest because there is a large number of citizens of this nation interested both directly and indirectly in different marketing agreements and different orders of the secretary entered into and promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 which contains identical provisions of exemption from the Anti-Trust Laws.

2. Petitioners, by the decision of the majority of the Court of Appeals, have been deprived of their property without due process of law.

   (A) The action of the majority of the Court of Appeals in affirming the judgment of the District Court has no support in the decision of this Court in the case

of *Lawlor, et al.* v. *Loewe, et al.*, 235 U. S. 522, 59 L. Ed. 341, and on the contrary it is in conflict with the decision of this Court in the case of *Buckeye Powder Co.* v. *duPont de Nemours Powder Co.*, 248 U. S. 55, at 65; 63 L. Ed. 123, at 128.

(B) The majority opinion of the Court of Appeals, basing its judgment of affirmance upon self-serving and opinionated evidence of respondent's president and assistant sales manager, directly conflicts with the decision of this Court in the case of *Boesch* v. *Graff*, 133 U. S. 697, at 708; 33 L. Ed. 787, at 791.

3. The opinion of the majority of the Court of Appeals denies to these petitioners a trial by jury in violation of their constitutional rights under the Seventh Amendment.

(A) The opinion and judgment of the majority of the Court of Appeals, holding that petitioners were not denied a trial by jury, conflicts with the decisions of this Court in the cases of *Berry* v. *United States of America*, 312 U. S. 450, at 452, 453, 85 L. Ed. 945, at 947; *Dimmick* v. *Schiedt*, 293 U. S. 474, at 485, 486, 487, 79 L. Ed. 602, at 610, 611; *Hodges* v. *Easton*, 106 U. S. 408, at 412, 27 L. Ed. 169, at 171; *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, at 28, 29, 60 L. Ed. 505, at 507.

(B) The opinion of the majority of the Court of Appeals in construing Rule 50b of the Rules of Civil Procedure so as to affirm the action of the District Court in setting aside the verdict of the jury and rendering judgment N.O.V. is in direct conflict with the decision of this Court in the case of *Berry* v. *United States of America*, 312 U. S. 450, at 452 and 453, 85 L. Ed. 945, at 947.

4. In holding a statute, controlling only hearings before the Federal Trade Commission, to be applicable to and governing civil suits at law for damages, the Circuit Court of Appeals so far departed and sanctioned such a departure by the District Court, from the accepted and

usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

5. As to whether respondent is barred from recovering because of its coming into court with unclean hands to recover diminished sums it failed to receive on account of unlawful sales made in violation of the Serum and Virus Act and its posted prices, presents an important question of federal law which has not been, but should be, decided by this Court.

6. The effect of the ruling of the secretary in dismissing a complaint involving the same matters of which complaint is now made, and from which no appeal was taken, presents an important federal question which has not been, but should be, decided by this Court.

   (A) Respondent was required to exhaust its administrative remedies before resorting to the courts.

   (B) The members of the serum and virus industry, as well as all other people interested directly or indirectly in any order of the secretary and any marketing agreement promulgated and entered into pursuant to the Agricultural Marketing Agreement Act of 1937, are entitled to have this important federal question determined.

7. The decision of the Circuit Court of Appeals in the case at bar is in direct conflict with the decision of the Eighth Circuit Court of Appeals in the case of *Farmers Co-operative Oil Company* v. *Socony Vacuum Oil Company*, 133 Fed. (2d) 101, upon the question as to whether respondent can maintain a suit to recover for alleged damages, if any, suffered only by its members and not by itself.

8. As respondent could not recover without collaterally attacking the legality of petitioner Anchor's postings and filings as to prices, terms of sale and discount, the opinion of the majority of the Circuit Court of Appeals is in direct conflict with the decisions of this Court in the cases of *Keogh* v. *Chicago & N. W. Ry. Co., et al.*, 260 U. S. 156, at 161 to 163, 67 L. Ed. 183, at 187 to 189;

Texas, Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, at 509, 510, 511, 56 L. Ed. 288, at 289, 290.

WHEREFORE, it is respectfully submitted that Petitioners' prayer for Writs of Certiorari to review said judgments of the Circuit Court of Appeals of the Seventh Circuit should be granted.

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BRIEF AND ARGUMENT.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

STATEMENT OF THE CASE.

Reference is made to the foregoing petition for Summary Statement of the Case, Citation to Opinions Below, and statement as to Jurisdiction.

II.

SPECIFICATIONS AND ASSIGNMENTS OF ERROR.

Petitioners adopt "Questions Presented" in the foregoing petition on pages 11 to 13, inclusive, as Petitioners' specifications and assignments of error.

III.

SUMMARY OF ARGUMENT.

Petitioners adopt "Reasons Relied On For The Allowance of the Writs" in the foregoing petition on pages 13 and 14 as their Summary of Argument.

IV.

ARGUMENT.

1.

WHAT EXEMPTIONS AND IMMUNITIES FROM THE ANTI-TRUST LAWS WERE GRANTED PETITIONERS AND OTHER HANDLERS AND MANUFACTURERS OF SERUM, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

By reference to Sections herein, unless otherwise designated, we are referring to Sections of Title 7 U. S. C. A.

By *Section 852* it was clearly provided that the making of any such Marketing Agreement should not be held to be a violation of the Anti-Trust Laws, and that any Marketing Agreement entered into by and with approval of the Secretary shall be deemed to be lawful.

In *Sub-section (7) of Section 608c* is found provisions regulating and pertaining to what the Order of the Secretary shall contain.

Under *Sub-sections (14) and (15) of Section 608c,* any handler who violates any provision of the Order, other than requiring the payment of prorata share of expense, upon conviction is subject to a fine of not less than $50.00 or more than $500.00 for each offense. The Secretary is required upon request of the handler to grant such a handler a hearing and to make rulings, and the District Court is granted jurisdiction to review such order or rulings.

Under *Section 608d,* the Secretary was given broad inquisitorial powers to determine whether his Order, the Marketing Agreement and the Act were being carried out,

and *to determine whether or not there had been any abuse of the privilege of exemption from the Anti-Trust Laws.*

Under *Section 608a,* the District Court was given jurisdiction to enforce, prevent and restrain any person from violating the Order, regulations or Agreement. The District Attorney, upon request of the Secretary, was required to institute proceedings to enforce the remedies and to collect forfeitures, and the Secretary was given inquisitorial powers to investigate and conduct hearings to determine the facts for the purpose of referring the matter to the Attorney General.

By *Sub-section (c) of Section 610,* the Secretary with the approval of the President, was authorized to make regulations with force and effect of law, necessary to carry out powers vested in him, and provided that any violation of such regulations, shall be subject to penalties not in excess of $100.00, as may be provided therein.

By *Sub-section (h) of Section 610,* the Secretary in order to efficiently administer the Act in question, the Order of the Secretary and the Marketing Agreement, was given inquisitorial powers, the same which were given the Federal Trade Commission under Sections 48, 49 and 50 of Title 15 U. S. C. A. The members of the industry were thereby subject to additional penalties, for violating any process issued by the Secretary and authorized by these laws.

Under *Paragraph 3 of Section 1 of Article IV* of both the order of the Secretary and the Marketing Agreement, no handlers were permitted to make sales to any class of purchaser unless they had postings filed to sell to such class of purchaser, and then only according to the price and terms of sale set forth in such postings (R. 674, 687).

Under *Section 4 of Article IV* of both the Order of the Secretary and the Marketing Agreement (R. 675, 688),

inserted therein by virtue of the authority contained in Paragraph B of Sub-section (7) of Section 608c, all handlers and manufacturers were required to sell at prices and terms to conform with their postings of prices, terms of sale and discount.

Under *Section 1 of Article V* of both the Order and the Marketing Agreement (R. 675, 688), the secret payment or allowances of rebates, refunds, commission or unearned discount were prohibited. Clearly, for a violation of either of these provisions or any other provision of the Order of the Secretary or Marketing Agreement, each handler or manufacturer would be subject to a fine of $50.00 to $500.00 for each offense as provided by Sub-sections (14) and (15) of Section 608c.

It is submitted that it was the clear intention of the Congress to permit the members of the serum industry, by and with the consent and approval of the Secretary of Agriculture, to do with immunity what the Anti-Trust laws forbade.

It is likewise clear that it was the intention of the Congress and the Congress did vest in the Secretary full power and authority to regulate and control the serum industry.

By the clear and positive terms of the Serum and Virus Act, the members of the industry were subject to severe penalties provided by the Act for each and every violation of the Act, the Order of the Secretary and the Marketing Agreement.

By simple words, free of ambiguities and susceptible of only one meaning, after the industry started to operate under the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement, and after the appointment of the Control Agency to administer the same, and

after the members filed their postings as to prices, terms of sale and discount, they became immune from the penalties and liabilities of the Anti-Trust laws of the nation.

Certainly it cannot be contended that it was the intention of the Congress to subject the members of the industry to the severe penalties and liabilities imposed by the Serum and Virus Act for violating the Act, the Order of the Secretary and the Marketing Agreement and at the same time to subject such members to the penalties and liabilties of the Anti-Trust laws. Such a contention would be placing the Congress of the United States in the position of perpetrating a fraud upon the members of the industry. Such, clearly, was not the intention of the Congress.

Be this position of the Petitioners correct or erroneous, it certainly presents a highly important question to the members of the industry, which has not been decided and determined by this Court but which should be fovever settled and determined by this Court.

As the matter now stands, without a decision of this Court on this specific question, the members of the industry cannot determine and neither can counsel, however learned, advise them as to exemptions or immunities, if any, they have from the Anti-Trust Laws.

The determination of this question by this Court is equally important to all citizens who might directly or indirectly be interested in other Marketing Agreements and Orders of the Secretary made, entered into and promulgated by virtue of the "Agricultural Marketing Agreement Act of 1937", which act contained identically the same provisions with reference to exemption and immunity from the Anti-Trust Laws. (Sec. 608b to 608e, incl. 7 U. S. C. A.)

As illustrative of those who are most vitally interested in this question, in the report of the Director of the Office of Distribution to the War Food Administrator, made on October 16, 1944, is found the following statements:

> "During all or part of the year, 25 marketing agreements and order programs were in force. Approximately 125,000 producers, with an output of some 13 billion pounds of milk worth almost $424,000,000, were subject to the programs." (Page 60 of said report.)
>
> "For citrus, 4 marketing-agreement programs were in effect during the year, including an estimated 48,000 growers of citrus in marketing-program areas and the equivalent on-tree value of the citrus they grow for fresh use estimated at about $180,000,000." (Pages 74 and 75 of said report.)

Petitioners also submit that the adjudication of this question presents a question of law of general national interest and one in which the nation at large is most vitally interested.

It is therefore submitted that Writs of Certiorari should issue to determine this highly important Federal question.

This Court did not decide the question now presented for its determination in the case of *United States* v. *Borden & Co.*, 308 U. S. 188, 84 L. Ed. 181. The question decided by this Court in that case was that the mere enactment of the Agricultural Marketing Agreement Act of 1937 did not create an exemption or immunity from the Anti-Trust laws. These Petitioners make and have made no contention that the enactment of the Serum and Virus Act created the immunity or exemption from the Anti-Trust laws. What these Petitioners do contend is that when they began operating under the Act in question in the manner hereinbefore outlined, the exemption or immunity was then created.

This Court, however, in the Borden case on pages 201 and 202 of 308 U. S. and page 192 of 84 L. Ed. said:

> *"An agreement made with the secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly agreed upon or directed by the secretary. Further than that the Agricultural Act does not go."* (Emphasis ours).

2.

THE TRUE EFFECT OF THE MAJORITY OPINION OF THE COURT OF APPEALS WAS TO DEPRIVE YOUR PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

There is not a scintilla of direct evidence in the record showing or tending to show that the acts of Petitioners, of which complaint is made, damaged Respondent or necessitated or required Respondent to reduce the selling price of its serum. The only evidence upon which the judgment of the Court of Appeals is based is hearsay and opinionated evidence.

Judge Major in his dissenting opinion in holding that there was no direct, competent evidence to sustain the judgment of the District Court, and that a verdict should have been directed by the District Court in favor of these Petitioners said:

> "The only testimony offered by plaintiff as the basis for its right to recover damages is that of its President Huff, and its Assistant Sales Manager, Davis. Neither of these witnesses had anything to do with or any contact with plaintiff's customers. The latter, in making purchases, dealt directly with the

> drugstores acting as plaintiff's agents. The testimony of Huff and Davis upon which plaintiff relies was offered and admitted solely as basic proof that plaintiff was required or compelled to reduce the selling price of its serum, and as a result thereof sustained the damage complained of. No other proof was offered on this phase of the case. This testimony is related by the majority and need not be repeated. Reduced to its naked form, it is that the witnesses (Huff and Davis) received complaints from druggists that they could not sell plaintiff's serum at 75c in competition with the Farm Bureaus who were selling at 65c. Upon such complaint being made, plaintiff ordered its druggists to reduce the price to 65c."

Then, after discussing the opinion of this Court in the case of *Lawlor et al.* v. *Loewe et al.*, 235 U. S. 522, at 536, 59 L. Ed. 341, and the decision of this Court in the case of *Buckeye Powder Co.* v. *E. I. DuPont De Nemours Powder Co. et al.*, 248 U. S. 55, at 65, 63 L. Ed. 123, said:

> "Taking these two cases together, it appears that a witness may testify as to the reasons assigned by a customer for refusing or ceasing to do business with the plaintiff. It is admissible, however, only for the purpose of showing the customer's motive and not as proof of a basis for recovery. As I understand, Wigmore on Evidence, 3d Ed., Vol. 6, Par. 1729 (2) makes a similar distinction."

Judge Major then after discussing the opinion of the Second Circuit Court of Appeals in the case of *Greater New York Live Poultry Chamber of Commerce et al.* v. *United States*, 47 Fed. (2d) 156, and other cases cited, in the majority opinion to sustain the right to base their judgment of affirmance upon hearsay evidence and *the decision of the Illinois Supreme Court*, in the case of *Carpenters' Union* v. *The Citizens Committee*, 333 Ill. 225, 164 N. E. 393, 63 A. L. R. 157 said:

"It should be kept in mind in the instant case that neither a druggist nor a customer was offered as a witness. If a druggist had been offered, I think under the rule announced in the authorities relied upon by the majority he could have testified as to the reasons assigned by customers as to why they ceased or refused to purchase plaintiff's product. Such testimony would have been proper for the limited purpose of showing the motive or the state of mind of the customer but not as proof of a right to recover.

* * * * *

"Moreover, the so-called hearsay testimony admitted amounted to nothing more than the opinion or conclusion of plaintiff's druggists that a reduction in price was necessary. This was testimony of a self-serving opinion made by the druggists who naturally were interested in obtaining permission from plaintiff to sell the latter's serum at the lower price. Moreover, the effect of the testimony is that the druggist was of the opinion that it was necessary to reduce the price because of information received from customers that they otherwise would not purchase. The testimony considered in this light is not merely hearsay but is hearsay heaped upon hearsay.

"So, in my opinion, the evidence complained of was no exception to the hearsay rule, was perhaps inadmissible for any purpose and certainly not for that for which it was offered. If my view in this respect is correct, there should have been a directed verdict for the defendants, because admittedly there was no other testimony which would afford any basis for recovery." (Emphasis ours.) (153 Fed. (2d) 915, 916, R. 1259 to 1263, incl.)

We submit that it is well settled by the decisions of this Court that any action of a Court, legislature or executive that is arbitrary, oppressive, unjust, confiscatory or unreasonable, denies to litigants due process of law.

Ballard v. *Hunter,* 204 U. S. 241, at 255, 256, 51 L. Ed. 461, at 472.

Hurtado v. *People of California,* 110 U. S. 516, at 532, 28 L. Ed. 232, at 237.

This Court has religiously held that any order of a commission or an executive of the government promulgated pursuant to legislative authority, which is not based upon facts, or is contrary to the facts, is void and invalid because it does not constitute due process of law.

Florida East Coast Ry. Co. v. *United States,* 234 U. S. 167, at 185, 58 L. Ed. 1267, at 1271 and 1272.

Beaumont, S. L. & W. R. Co. v. *United States,* 282 U. S. 74, at 86, 75 L. Ed. 221, at 230.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States,* 295 U. S. 193, at 201, 202, 79 L. Ed. 1382, at 1389, 1390.

Panama Refining Co. v. *Ryan,* 293 U. S. 388, at 431 to 433, 79 L. Ed. 446, at 464, 465.

3.

THE JUDGMENT OF THIS COURT IN THE CASE OF LAWLOR ET AL. V. LOEWE ET AL., 235 U. S. 522, 59 L. ED. 341, WAS NOT BASED UPON HEARSAY OR OPINIONATED EVIDENCE AND FURNISHES NO SUPPORT FOR THE JUDGMENT OF THE MAJORITY OF THE COURT OF APPEALS. THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF BUCKEYE POWDER CO. V. DUPONT DE NEMOURS POWDER CO., 248 U. S. 55, 63 L. ED. 123.

An examination of the voluminous record in the Lawlor case shows that plaintiff offered in evidence the testimony of 46 disinterested witnesses from 11 different states and 19 different cities, who had previously as distributors, wholesalers, dealers, jobbers or retailers, handled plaintiff's hats.

Some of these witnesses were salesmen, not for the plaintiff but of these different distributors, wholesalers, dealers and jobbers. These witnesses testified that the

Labor Unions circularized them. That business agents and members of the Unions called upon them insisting that they stop handling plaintiff's hats or members of the Unions would cease trading with them; that they would picket the witnesses' places of business and sometimes even threatened the plaintiff's dealers in other ways, some even to the extent of inferring violence.

This Court in the case of *Buckeye Powder Co.* v. *DuPont De Nemours Powder Co.,* 248 U. S. 55, 63 L. Ed. 123, speaking through the same Justice, who wrote the opinion in the Lawlor case, on page 65 of 248 U. S. and page 128 of 63 L. Ed. said:

> "* * * Several exceptions were taken to the exclusion of statements by third persons of their reasons for refusing or ceasing to do business with the plaintiff. We should be slow to overthrow a judgment on the ground of either the exclusion or admission of such statements except in a very strong case. But the exclusion in this instance was proper. The statement was wanted not as evidence of the motive of the speakers, but as evidence of the facts recited as furnishing the motives. *Lawlor* v. *Loewe,* 235 U. S. 522, 536, 59 L. ed. 341, 349, 35 Sup. Ct. Rep. 170; *Elmer* v. *Fessenden,* 151 Mass. 359, 362, 5 L. R. A. 724, 22 N. E. 635, 24 N. E. 209."

Petitioners, therefore, insist that the *Lawlor* case furnishes no justification for the majority opinion of the Court of Appeals and that such opinion is in conflict with the opinion of this Court in the case of the Buckeye Powder Company.

4.

THE MAJORITY OPINION OF THE COURT OF APPEALS DENIES THESE PETITIONERS THEIR CONSTITUTIONAL RIGHT OF A TRIAL BY JURY.

The only statement found in the majority opinion of the Court of Appeals on this question is the following:

> "In so doing we think there was no error, nor was there a violation of defendants' right of trial by jury." (153 Fed. (2d) at 915, R. 1259).

Judge Major in his dissenting opinion in speaking upon this question said:

> "Assuming that the view expressed as to the admissibility of this testimony is erroneous, I still think the judgment should be reversed. This is so for the reason that plaintiff's assertion that it was required or compelled to reduce its price in order to meet Farm Bureau competition presented an issue of fact for jury determination.
>
> * * * * *
>
> "In my view, a consideration of plaintiff's testimony alone present a jury question on the vital issue as to whether plaintiff was required or compelled to reduce its price. Accepting it at its face value, it carries little probative weight. As already pointed out, it is based solely on the hearsay testimony coming from plaintiff's druggists who naturally were interested in obtaining permission from plaintiff to sell serum at the reduced price. It was a self-serving statement on their part. As admitted by plaintiff's witness Huff on cross-examination:
>
> > 'I wouldn't say they (the druggists) quit us cold and took you (the Farm Bureaus) on, but I know that was one of the arguments to get this price of ours down.'
>
> * * * * *
>
> "On direct examination Huff testified that plaintiff had not reduced its price in any state other than Illinois. He later admitted, however, that the price was

reduced at three different towns in Iowa, in the same manner as it had been in Illinois. Admittedly, it had no competition from the Farm Bureau or the defendants in Iowa.

* * * * *

"Without going into further detail, it is sufficient to observe that the testimony of both Huff and Davis is in many respects inconsistent with the assertion that plaintiff was required or compelled to reduce the price of its serum. In my opinion, a trier of the facts was not bound to accept as conclusive the hearsay and opinionated evidence of these witnesses that plaintiff was so compelled. *If their testimony presented no issue of fact for a jury on this vital issue and a court was bound to accept it as a matter of law, it would appear that plaintiff's decision on this issue was final.*

* * * * *

"Assuming that plaintiff in the sale of its serum was in competition with the Farm Bureaus, to hold that it was as a matter of law required or compelled to reduce its price is to ignore the realities of the situation.

* * * * *

"I think the court properly submitted to the jury the issue as to whether plaintiff was required or compelled to reduce the price of its serum. The question having been properly submitted, the jury's answer thereto should have been accepted. It follows, in my view, that the court's action in entering a judgment notwithstanding the verdict, was erroneous and that it should be reversed." (Emphasis ours.) (153 Fed. (2d) 917, 918, R. 1263 to 1267, incl.)

Even the trial judge in overruling Respondent's motion for a directed verdict admitted that an attempt had been made to impeach the Respondent's books, that he wouldn't say whether it was or was not successful, but that it was a question that should go to a jury. (R. 629).

The trial court in making one of the very few favorable rulings for Petitioners said:

"Possibly for some of the reasons suggested by Mr. Myers and Mr. Meloy, it would be error to refuse to

permit cross-examination along these lines. You can argue the effect of it to the jury. Proceed." (R. 346).

On cross-examination Respondent's witness, Taylor, a Certified Public Accountant, admitted that with reference to the period covering from January 31, 1937 to May 27, 1937 in regard to at least eight (8) drug stores, that Respondent claimed a reduced price of 10c per 100 ccs. on more serum than the Respondent sold to these drug stores in that period. (R. 317 to 323, incl.). When Respondent attempted to correct these discrepancies, they only made a correction with reference to one (1) drug store. (R. 327 to 332, incl.) Respondent in justification as to the other seven (7) drug stores offered credit memos (R. 332).

While all humanity understands that any one can write a credit memo, it certainly is a deep mystery how any one can suffer a loss on account of reduced prices upon more serum than it sold during that period of time. To say the least, this was one of many circumstances to be weighed, considered and determined by the triers of fact—the jury.

There was not a scintilla of evidence offered that the druggists actually reduced the selling price of the serum to the consumer at 65¢, the only evidence being that the Respondent reduced its price to the drug stores from 63¢ to 53¢.

The majority opinion of the Court of Appeals entirely overlooks the fact that Respondent's alleged and purported allowances and reductions could have been made by Respondent for several purposes; to meet competition of its forty (40) other competitors with whom it was in direct competition, or, to sell patrons and customers of its forty (40) other competitors, or, for the purpose of paying Veterinarians to assist farmers and teach them how to vaccinate their hogs, as it did in at least two (2) towns in Iowa. (R. 356 to 360, incl.)

No principle of law has been more clearly announced and more religiously followed by this Court and other Courts of the nation than the principle that where the evidence of a case is of such a nature so that reasonable minds might differ as to its effect, or might draw different inferences therefrom, it is error for the trial court to direct a verdict or render judgment n.o.v. for either party.

Certainly it must be conceded that Judge Major possesses a reasonable mind. Then, clearly, there is presented here a case where reasonable minds have already differed as to the effect of the evidence of the case and that different inferences have been drawn therefrom.

5.

THE OPINION AND JUDGMENT RENDERED BY THE MAJORITY OF THE COURT OF APPEALS HOLDING THAT PETITIONERS WERE NOT DENIED A TRIAL BY JURY IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN THE CASES OF: BERRY V. UNITED STATES OF AMERICA, 312 U. S. 450, at 452, 453, 85 L. ED. 945, at 947; DIMMICK V. SCHIEDT, 293 U. S. 474, at 485, 486, 487, 79 L. ED. 603, at 610, 611; HODGES V. EASTON, 106 U. S. 408, at 412, 27 L. ED. 169, at 171; FLEITMANN V. WELSBACH STREET LIGHTING CO., 240 U. S. 27, at 28, 29, 60 L. ED. 505, at 507.

This Court in the case of *Fleitmann* v. *Welsbach Street Lighting Company*, 240 U. S. 27, 60 L. Ed. 505, on page 29 of 240 U. S. and page 507 of 60 L. Ed. said:

> *"But we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other."* (Emphasis ours.)

That the decision of the Court of Appeals is in conflict with the above decisions of this Court is readily apparent by a consideration of this Court's opinions in those cases. We will, therefore, not further lengthen this brief in this respect.

6.

THE HOLDING OF THE MAJORITY OPINION OF THE COURT OF APPEALS IN CONSTRUING RULE 50(b) SO AS TO AFFIRM THE ACTION OF THE TRIAL COURT IN SETTING ASIDE THE VERDICT OF THE JURY AND RENDERING JUDGMENT N.O.V. IS IN CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF: BERRY V. UNITED STATES OF AMERICA, 312 U. S. 450, at 452, 453, 85 L. ED. 945, at 947.

This Court in the case of *Berry* v. *United States of America, supra,* in reversing a judgment of the Circuit Court of Appeals of the Second Circuit, which Court had reversed a judgment of the District Court and directed that a judgment be entered under Rule 50(b) in favor of the defendant, on pages 452 and 453 of 312 U. S. and page 947 of 85 L. Ed. said:

> "Rule 50(b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. *But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law.*" (Emphasis ours.)

7.

THE ACTION OF THE MAJORITY OF THE COURT OF APPEALS IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT BASED ONLY UPON THE OPINIONATED EVIDENCE OF THE RESPONDENT'S PRESIDENT AND ASSISTANT SALES MANAGER IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN THE CASE OF: BOESCH V. GRAFF, 133 U. S. 697, 33 L. ED. 787.

In the case of *Boesch* v. *Graff, supra,* the plaintiff sued to recover damage for the infringement of a patent. This Court in holding that the opinionated evidence of the plaintiff was not sufficient to sustain a recovery, on page 708 of 133 U. S. and page 791 of 33 L. Ed. said:

> "Conceding that as Graff granted no licenses, and had no established license fee, but supplied the demand for his burner himself, and was able to supply that demand, and that, therefore, if he was compelled to lower the price by the infringement he could recover for the loss thus sustained, *does the evidence satisfactorily establish that the reduction in prices was due solely to the acts of the defendants in infringing?*
>
> *The opinion, of Mr. and Mrs. Graff, to that effect is not sufficient, and even that is so qualified as to fall far short of expressing it.*" (Emphasis ours.)

It must be concededly admitted that in the case at bar there was no evidence introduced whatsoever to show that the Respondent was required to reduce its selling price of serum in Illinois, except the opinionated evidence of Respondent's President and Assistant Sales Manager. It, therefore, of necessity must follow that the opinion of the Court of Appeals is in direct conflict with the opinion of this Court.

8.

THE OPINION OF THE MAJORITY OF THE CIRCUIT COURT OF APPEALS IN HOLDING THAT SECTION 13(b) OF TITLE 15 U. S. C. A. HAS CHANGED THE LONG AND WELL SETTLED RULES OF THIS NATION IN ACTIONS AT COMMON LAW WITH REFERENCE TO BURDEN OF PROOF, AND ESPECIALLY IN AN ACTION TO RECOVER UNDER HIGH PENAL STATUTES SUCH AS TRIPLE DAMAGES UNDER THE ANTI-TRUST LAWS, IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE COURT OF APPEALS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The majority of the Court of Appeals held in the case at bar that the burden was shifted to petitioners to prove that the alleged and purported damage, if any, was otherwise caused than by the action of these petitioners of which complaint is made. The court in its opinion said:

> "*Under this statute when a prima facie case is made, the burden shifts to the defendant, if it can do so, to show that the damage, if any, was otherwise caused. 15 U. S. C. A. Sec 13(b).*" (Emphasis ours.)
>
> (153 Fed. (2d) 907, at 912. R. 1254.)

In so holding, the Court of Appeals has abrogated and destroyed the law long and well settled by this court, and other federal courts, requiring the plaintiff in such cases to prove with definiteness and certainty that the acts in question damaged the respondent.

The rule which has been announced and religiously followed is well stated by a decision of the Sixth Circuit Court of Appeals, citing decisions of this court to sustain itself, in the case of *Dickinson* v. *O. & W. Thum Co.*, 8 Fed. (2d) 570, wherein the Court on pages 575 and 576, said:

"When a plaintiff in a trade-mark or unfair competition case seeks to recover damages, the burden is on him to prove by competent and sufficient evidence his lost sales, or that he was compelled to reduce prices as the result of his competitor's wrongful conduct. There is no presumption of law or of fact that a plaintiff would have made the sales that the defendant made. In this case there is no sufficient, much less conclusive, evidence to show that plaintiff would have made all or any substantial part of the sales made by the defendant. *Nor is there any adequate, much less conclusive, evidence that plaintiff reduced its price as a result of defendant's wrongful conduct. The evidence, on the other hand, is quite clear and convincing to the contrary.* The same observations apply to the claim of damages to plaintiff's business from the inferior quality of defendant's product; it is not supported by adequate proof. For decisions showing the burden cast upon one claiming damages, and denying relief in the face of evidence of greater probative force, see the following *Cornely* v. *Marckwald,* 131 U. S. 159, 9 S. Ct. 744, 33 L. Ed. 117; *Boesch* v. *Graff,* 133 U. S. 697, 10 S. Ct. 378, 33 L. Ed. 787; *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.,* 235 U. S. 641, 648, 35 S. Ct. 221, 59 L. Ed. 398; *McSherry* v. *Dowagiac Mfg. Co.* (6 C. C. A.) 160 F. 948, 961, 89 C. C. A. 26; *Randall Co.* v. *Fogelsong Mach Co.* (6 C. C. A.) 216 F. 601, 132 C. C. A. 605; *United States Frumentum Co.* v. *Lauhaff* (6 C. C. A.) 216 F. 610, 614, 132 C. C. A. 614." (Emphasis ours.)

In the case of the *American Sea Green Slate Co. et al.* v. *O'Halloran et al.* (2nd C. C. A.), 229 Fed. 77, the Court on pages 79 and 81 said:

"These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote or uncertain. * * * Moreover, without any testimony from the three concerns, it is assumed that they ceased buying from the plaintiffs because of defendants' acts. But these three concerns were free to change at will; several reasons might be suggested why they ceased buying from the plaintiff. It was for

> the plaintiffs to show that the change was *because* of defendants' combination. If that were the reason, it was *provable* out of the mouths of the three dealers; merely to infer it from the fact that they made the change is pure speculation."

In the case of the *Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 Fed. (2d) 747, the Eighth Circuit Court of Appeals on page 751, said:

> "It is to be noted that here a recovery is sought for triple damages, a privilege that immediately suggests necessary definiteness in the basis of damages as attributable to the violation of the Federal Act."

Section 13(b) of Title 15 U. S. C. A. has no application to courts of law. Its only application is to hearings before the Federal Trade Commission for cease and desist orders. To justify this position one needs only to read the section of the act itself, which is in words and figures, as follows, to-wit:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

We, therefore, submit that this ruling of the Circuit Court of Appeals is erroneous and in conflict with the well established and elementary law of this land relative to bur-

den of proof in civil cases for damages, and is a departure from the accepted and usual course of judicial proceedings requiring this court to exercise its power of supervision.

9.

AS RESPONDENT DURING THE TIME IN QUESTION WAS OPERATING UNDER THE SERUM AND VIRUS ACT, AND SUBJECT ONLY TO THE PENALTIES AND LIABILITIES THEREBY PRESCRIBED, AND WAS NOT SUBJECT TO THE PENALTIES AND LIABILITIES OF THE ANTI-TRUST LAWS, WHETHER RESPONDENT CAME INTO COURT WITH UNCLEAN HANDS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT.

During the period of time in question Respondent insists it sold part of its serum to consumers at 65¢ per 100 ccs. instead of its posted price and sues to recover for the difference between the diminished sums which it alleges it did receive and the sums it would have received had it sold its serum at its posted prices. (R. 68.)

If Respondent and its agents or dealers actually did sell serum during this period of time to consumers at 65¢, it violated Paragraph B of Sub-section (7) of Section 608c of Title 7 U. S. C. A., as well as Paragraph 3 of Section 1 of Article IV of both the Order of the Secretary and the Marketing Agreement.

The Respondent for each of said sales so alleged to have been made by it, subjected itself to a fine of not less than $50.00 or more than $500.00 as provided by Paragraph (14) of Section 608c, Title 7 U. S .C. A. Clearly, Respondent with reference to its transactions, for which it sues to recover damages, comes into Court with unclean hands.

The majority of the Circuit Court of Appeals justified Respondent's action in making the sales in question in violation of Respondent's posted prices and in violation of the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement by the provisions of the Robinson-Patman Act. In its opinion the Court said:

> *"Furthermore,* 15 *U. S. C. A., Sec.* 13(b) *provides that the alleged inequitable conduct of plaintiff, here relied upon, is not a violation of that act on the part of the plaintiff."*
> (153 Fed. (2d) 907, at 912, R. 1254.)
> (Emphasis ours.)

During all the period of time in question Respondent was operating under the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement. Respondent was not liable for the penalties and liabilities prescribed by the Anti-Trust laws. It was only liable for the penalties and liabilities of the Serum and Virus Act. It, therefore, cannot justify its violation of the Serum and Virus Act, the Order of the Secretary and the Marketing Agreement, and its postings of prices, terms of sale and discount by any provision of the Robinson-Patman Act. It is submitted that this presents an important question of Federal law which has not been but should be decided by this Court.

10.

THE SECRETARY OF AGRICULTURE HAVING BEEN GIVEN THE EXCLUSIVE RIGHT TO ADMINISTER THE SERUM AND VIRUS ACT SUBJECT ONLY TO THE RIGHT OF ANY AGGRIEVED PARTY TO HAVE THE SECRETARY'S RULINGS REVIEWED BY THE COURTS, THE ORDER OF THE SECRETARY DISMISSING THE COMPLAINT FILED BY THE CONTROL AGENCY INVOLVING THE SAME MATTERS AS INVOLVED IN THE CASE AT BAR, SHOULD BE CONCLUSIVE ON ALL THE PARTIES, WHICH PRESENTS AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN BUT SHOULD BE DETERMINED BY THIS COURT.

Petitioner Anchor, in its answer, specially pleaded this defense. (R. 97, 98.) Upon motion of Respondent, the District Court struck this defense. (R. 115.) In the trial of the case, Petitioners offered to prove these facts, which evidence was rejected by the District Court. (R. 529 to 553, inclusive.)

The complaint involved the same matters of which complaint is made in this action. The Secretary of Agriculture denied the complaint because Petitioner Anchor's publicly filed price list with the Control Agency contained the provision with reference to spending liberal allowances for advertising and sales promotion work, it had been permitted to operate in this manner for two and one-half years, that the action had been acquiesced in by the Control Agency and indulged in by other members of the industry, and because when the objections were first made Petitioner Anchor changed its postings to conform with the objection. (R. 530, 531.)

From this action and ruling of the Secretary, no appeal was taken to the courts as is provided therefor by the Serum and Virus Act in question.

As the Secretary was given the exclusive right to administer the act and control the industry, and Respondent not having prosecuted its remedy as provided by the act, Respondent is conclusively bound by the ruling of the Secretary.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, at 49 to 52, incl., 82 L. Ed. 638, at 643 to 645, incl.

Macauley et al. v. *Waterman Steamship Corp.* (not yet officially published) 90 L. Ed. Advance Sheet 11, page 676.

11.

THE DECISION OF THE MAJORITY OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN THE CASE OF FARMERS CO-OPERATIVE OIL COMPANY V. SOCONY VACUUM OIL COMPANY, 133 FED. (2d) 101.

In the *Farmers Co-operative Oil Company* case, the plaintiff, like the respondent, was incorporated under *Chapter* 390 *GI of the Code of Iowa.*

In the *Farmers Co-operative Oil Company* case, suit was brought to recover damages for causing an increase in the price of gasoline, by wrongful conspiracy, 2¼¢ per gallon. The Co-operative in that case passed the increased price on to its members. The Eighth Circuit Court of Appeals held that the right of action belonged to the member customers of the Co-operative and not to the Co-operative, except such damage as the Co-operative itself suffered. That, therefore, under Rule 17(a) of the Rules of Civil procedure the Co-operative could not maintain the action except for the damage, if any, it itself actually sustained, either on its own behalf or in a representative capacity.

In the case at bar, that part of the answer of the Petitioners pleading this defense, upon motion of Respondent, was stricken by the District Court. (R. 75, 76, 98, 115.) All allegations therein contained were admitted. For the purpose of considering this question, it therefore must be conceded that the respondent's earnings during all the time in question exceeded its expenses of operation, taxes, interest, insurance, etc., and after providing reserves and surpluses permitted by the statutes, had substantial earnings which, under the statutes of Iowa, were required to be distributed to its members. Therefore, in the case at bar the loss, if any, was passed on to or suffered by the members of Respondent and not by Respondent itself.

Had the Circuit Court of Appeals followed the Eighth Circuit Court of Appeals in the *Farmers Co-operative Oil Company* case, it necessarily follows that it would have been compelled to have held that the Respondent could not have maintained this action.

There is, therefore, clearly presented a conflict between the decision of the Circuit Court of Appeals in the case at bar and the decision of the Circuit Court of Appeals for the Eighth Circuit in the *Farmers Co-operative Oil Company* case. There is also presented here a question of general law of national importance which should be settled and determined by a decision of this Court reviewing the case by writs of certiorari.

CONCLUSION.

It is, therefore, submitted that writs of certiorari should be allowed as prayed for and the judgments of the court below should be reversed.

Respectfully submitted,

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Anchor Serum Company.

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APPENDIX.

THE PROVISIONS OF THE CONGRESSIONAL ENACTMENT IN QUESTION KNOWN AS THE ANTI-HOG CHOLERA SERUM AND HOG CHOLERA VIRUS ACT.

This Enactment, together with all other provisions of the Agricultural Adjustment Act made applicable, is found in Title 7 U. S. C. A., and the provisions thereof with their proper citations under Title 7 are as follows, to-wit:

"Section 851. *Declaration of policy.*

"It is hereby declared to be the policy of Congress to insure the maintenance of an adequate supply of anti-hog-cholera serum and hog-cholera virus by regulating the marketing of such serum and virus in interstate and foreign commerce, and to prevent undue and excessive fluctuations and unfair methods of competition and unfair trade practices in such marketing. Aug. 24, 1935, c. 641, Sec. 56, 49 Stat. 781."

"Section 852. *Marketing agreements with handlers; exemption from anti-trust laws.*

"In order to effectuate the policy declared in section 851 of this title the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with manufacturers and others engaged in the handling of anti-hog-cholera serum and hog-cholera virus only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in such serum and virus. Such persons are in section 854 of this title referred to as 'handlers.' The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United

States, and any such agreement shall be deemed to be lawful. Aug. 24, 1935, c. 641, Sec. 57, 49 Stat. 781."

"Section 853. *Terms and conditions of marketing agreements.*

"Marketing agreements entered into pursuant to section 852 of this title shall contain such one or more of the following terms and conditions and no others as the Secretary finds, upon the basis of the hearing provided for in section 852 of this title, will tend to effectuate the policy declared in section 851 of this title:

"(a) One or more of the terms and conditions specified in subsection (7) of section 608c of this title.

"(b) Terms and conditions requiring each manufacturer to have available on May 1 of each year a supply of completed serum equivalent to not less than 40 per centum of his previous year's sales. Aug. 24, 1935, c. 641, Sec. 58, 49 Stat. 781."

"Section 854. *Order regulating handlers; issuance and terms.*

"Whenever all the handlers of not less than 75 per centum of the volume of anti-hog-cholera serum and hog-cholera virus which is handled in the current of interstate or foreign commerce, or so as directly to burden, obstruct, or affect interstate or foreign commerce, have signed a marketing agreement entered into with the Secretary of Agriculture pursuant to section 852 of this title, the Secretary of Agriculture shall issue an order which shall regulate only such handling in the same manner as, and contain only such terms and conditions as are contained in such marketing agreement, and shall from time to time amend such order in conformance with amendments to such marketing agreement. Such order shall terminate upon termination of such marketing agreement as provided in such marketing agreement. Aug. 24, 1935, c. 641, Sec. 59, 49 Stat. 781."

"Section 855. *Applicability of other laws.*

"Subject to the policy declared in section 851 of this title, the provisions of subsection (6), (7), (8), and (9) of section 608a and of subsections (14) and (15)

of section 608c of this title, are made applicable in connection with orders issued pursuant to section 854 of this title, and the provisions of section 608d of this title are hereby made applicable in connection with marketing agreements entered into pursuant to section 852 of this title and orders issued pursuant to section 854 of this title. The provisions of subsections (a), (b) (2), (c), (f), (h), and (i) of section 610 of this title, as amended, are hereby made applicable in connection with the administration of this chapter. Aug. 24, 1935, c. 641, Sec. 60, 49 Stat. 782."

"Section 608a.

"(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts."

"(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this chapter. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action."

"(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this chapter or now or hereafter existing at law or in equity."

"(9) The term 'person' as used in this chapter includes an individual, partnership, corporation, associa-

tion, and any other business unit. May 12, 1933, c. 25, Title 1, Sec. 8a; May 9, 1934, 11:23 a. m., c. 263, Sec. 4, 48 Stat. 672; Aug. 24, 1935, c. 641, Sections 8, 9, 10, 49 Stat. 762; June 3, 1937, c. 296, Sections 1, 2(c), 50 Stat. 246, 247."

"Section 608c.

"(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

"(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

"(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

"(i) To administer such order in accordance with its terms and provisions;

"(ii) To make rules and regulations to effectuate the terms and provisions of such order;

"(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

"(iv) To recommend to the Secretary of Agriculture amendments to such order.

"No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

"(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of

such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: *Provided,* That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15)."

"(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the district court of the United States for the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings insti-

tuted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

"Section 608d. *Books and records; disclosure of information.*

"(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from th antitrust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

"(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired

by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office. May 12, 1933, c. 25, Title I, Sec. 8d; Aug. 24, 1935, c. 641, Sec. 6, 49 Stat. 761; June 3, 1937, c. 296, Sec. 1, 50 Stat. 246."

"Section 610. *Powers of Secretary of Agriculture generally—Appointment of officers and employees; exemption from civil service regulations; salaries; impounding appropriations.*

"(a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of chapter 13 of Title 5, and such experts, as are necessary to execute the functions vested in him by this chapter; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions

vested in him by this chapter: And provided further, That the State Administrator appointed to administer this chapter in each State shall be appointed by the President, by and with the advice and consent of the Senate. Section 8 of Title II of the Act entitled 'An Act to maintain the credit of the United States Government,' approved March 20, 1933 (Title 5, Sec. 673 note), to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this chapter."

"(b) (2) Each order issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy."

"(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be sub-

ject to such penalty, not in excess of $100, as may be provided therein."

"(f) The provisions of this chapter shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this chapter, is authorized by proclamation to make the provisions of this chapter applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone and/or the island of Guam."

"(h) For the efficient administration of the provisions of sections 608 to 619 of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter and to any person subject to the provisions of this chapter, whether or not a corporation. Hearings authorized or required under this chapter shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under sections 608 to 619 of this chapter, to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay."

"(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of

such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided,* That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title."

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

Nos. 185-186

ANCHOR SERUM COMPANY, A CORPORATION OF MISSOURI,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
A CORPORATION OF IOWA,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
A CORPORATION OF ILLINOIS,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
A CORPORATION OF IOWA,
Respondent.

BRIEF OF AMERICAN COOPERATIVE SERUM ASSOCIATION IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 1247-1269) is reported in 153 F. (2d) 907-918.

JURISDICTION.

The judgment of the Seventh Circuit Court of Appeals was entered March 4, 1946 (R. 1247). Petition for rehearing was denied April 3, 1946 (R. 134). Petition for writs of certiorari was filed June 13, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in affirming a judgment in favor of the respondent and against the petitioners in the amount of $13,347.93 for damages sustained because of petitioners' violations of the Anti-Trust Laws.

STATUTE INVOLVED.

The pertinent provisions of the Anti-Trust Laws (15 U. S. C. A. §§ 13, 15), which were relied upon to sustain plaintiff's cause of action, are as follows:

> "§ 13. **Discrimination in price, services, or facilities—Price; selection of customers.**
>
> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of

either of them: *Provided,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided, further,* That nothing contained in sections 12, 13, 14-21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

* * * * *

(c) Payment or acceptance of commission, brokerage or other compensation.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or

any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

* * * * *

(f) Knowingly inducing or receiving discriminatory price.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730; June 19, 1936, ch. 592, § 1, 49 Stat. 1526.)

* * * * *

§ 15. Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)''

STATEMENT.

Respondent deems petitioners' statement of the case wholly inadequate.

Respondent recovered a judgment n. o. v. against the petitioners in the District Court in the amount of $5,888.70, which, being trebled pursuant to statute, resulted in a judgment of $17,666.10, together with a $2,500 allowance for attorneys' fees. On appeal the Circuit Court of Ap-

peals reduced the judgment to $4,449.31 and affirmed the same in the amount of $13,347.93, together with attorneys' fees.

Respondent's suit was brought under the Anti-Trust Laws. The commodities involved were the subject of Congressional attention in the Anti-Hog-Cholera Serum Marketing Act (7 U. S. C. A. § 851). Reference to the substance of such legislation is, therefore, a necessary preliminary to further statement of the case.

The Clayton Act of 1914, which is part of the Anti-Trust Laws, prohibited threats to competition and thwarted trends toward the creation of monopolies to be effected by means of unjustifiable discriminations in price. Such price-cutting tactics had been frequently employed in selected localities by dominant manufacturers as a preliminary step in the erection of a monopoly. The Robinson-Patman Act, enacted in 1936, implemented this basic purpose of the Clayton Act. It further extended the prohibition against unjustified price discriminations and also prohibited certain specific trade practices which had grown up and which the Congress deemed pernicious. At the time of the acts complained of in this case, therefore, it was unlawful for persons engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect *may* be to lessen competition, or, to injure, destroy or prevent competition *with* any person who either grants or knowingly receives the benefit of such discrimination. It was also unlawful under the Anti-Trust Laws for one party to a bargain to pay a commission, brokerage, rebate, or any other form of compensation to an agent for the opposite party to the bargain.

Under Title 15, § 13(a), a discriminatory price having been shown by evidence, the burden of rebutting the prima facie case and justifying the discriminatory price, passes

to the person charged with the violation of the section. This is because that portion of the law which permits differentials (which make *only due allowances* for differences in cost of manufacture, sale or delivery) comes under a *proviso* and it is well settled law that he who would claim the benefit of a *proviso* in a statute (in this case the petitioners) has the burden of pleading and proving the same.

Under Title 15, § 13(c), it is declared to be unlawful for any person engaged in commerce "to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

The evidence in this case showed conclusively that the secret rebate arrangements hereinafter set forth, which were in effect between petitioners, constituted a violation of Title 15, § § 2(a), 2(c), 2(d), and 2(f), and the District Court and the Circuit Court of Appeals had no other alternative than to so hold.

Anti-hog-cholera serum, as the name implies, is a product made by processing the blood withdrawn from hogs that have successfully resisted the disease (R. 237, 238). All such serum is produced under license from the United States Department of Agriculture. The processes are carried out under Government inspection. Because the serum is produced under license and under Government inspec-

tion, the serum produced by any one manufacturer is very little different than the serum produced by another.

The Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, enacted August 24, 1935, was one of a series of amendments to the Agricultural Adjustment Act of 1933. (7 U. S. C. A. §§ 851-855.) The Serum Act declared a Congressional policy of (1) assuring the maintenance of an adequate supply of anti-hog-cholera serum and virus, and (2) preventing undue and excessive fluctuations of market prices and unfair methods of competition and unfair trade practices in the marketing of such serum and virus. In order to achieve these ends the legislation contemplated, that, after due notice and hearing to interested parties, a Marketing Agreement might be entered into between the Secretary of Agriculture and the manufacturers and handlers of serum and virus. The *making* of any such Marketing Agreement was not to constitute a violation of the Anti-Trust Laws.

The legislation contemplated that any such approved Marketing Agreement should contain terms and conditions requiring each manufacturer to have available on May first of each year a supply of completed serum equal to 40% of his last year's sales; also that such Agreement should contain provisions (a) prohibiting unfair methods of competition and unfair trade practices; (b) that such serum should be sold only at prices filed and announced by such handlers; (c) that the Secretary should select an agency to administer the Secretary's Order and supervise the activities of the handlers. Whenever handlers of 75% of the interstate volume of serum and virus had signed such a Marketing Agreement the Secretary of Agriculture was empowered to issue an Order regulating such handling of serum and virus in the manner contemplated by the Marketing Agreement. Both the Marketing Agreement and

the Secretary's Order envisioned the creation of a Control Agency of twelve members to supervise the operation of the Marketing Agreement, consisting of and representing manufacturers and distributors of serum and virus. (7 U. S. C. A. §§ 853, 854, 855.)

The most crucial provision of the Marketing Agreement and the Order was a provision for the public posting or filing of prices and terms of sale for serum and virus. The Marketing Agreement provided that each serum handler was required to file with the Secretary and with the Control Agency a list of his selling prices for serum and virus prevailing in the United States, including terms of sales and discounts to each class of buyer as defined in the Marketing Agreement. A form of schedule was prescribed by the Agency to be used in filing such prices (R. 521). By this means there was provided a central agency where there would be an open and public listing of all prices by each manufacturer to each classification of buyer. No handler was to make sales of serum or virus unless he had a list of his prices on file. No handler was to make sales at any prices or terms which were different from those set forth in his posted price list. Provision was made for change in prices or for the suspension by the Secretary of any price which he deemed inequitable. Unfair methods of competition and unfair trade practices were prohibited (R. 688). The secret payment or allowances of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or secretly extending special services or privileges to certain purchasers with the intent and effect of injuring a competitor, or where the effect might be to substantially lessen competition or tend to create a monopoly, was defined by the Agreement as an unfair trade practice (R. 688).

Anchor Serum Company, one of the petitioners, is a

Missouri corporation with a plant and offices located at St. Joseph, Missouri, where it is engaged in the manufacture of anti-hog-cholera serum and hog-cholera virus (R. 63, 85).

Illinois Farm Bureau Serum Association is an Illinois corporation which was organized under the Agricultural Cooperative Act of the State of Illinois (R. 723). Its corporate charter provided that its corporate purpose was to act as agent for its members, in collectively purchasing, handling, and distributing livestock and preventive disease biologics, of which anti-hog-cholera serum was one. Its membership was composed of and limited to so-called County Farm Bureaus. There were over 75,000 individual members of the County Farm Bureaus located in the State of Illinois, of whom 20,000 were serum purchasers. The serum-selling activities of the County Farm Bureau members blanketed 100 of the 102 counties in the State of Illinois (R. 1063). Petitioner maintained desk space in the offices of the Agricultural Association but it had no refrigeration or storage facilities. In actual practice the orders for serum were sent by the individual County Farm Bureaus direct to the manufacturer Anchor at St. Joseph, Missouri. Anchor filled the orders, shipped the serum direct to the individual County Farm Bureau requesting the same. Then Anchor sent the bill therefor to petitioner Illinois at its office in Chicago, who paid the same in due course, and collected from its member.

Respondent is a cooperative organization organized under the laws of the State of Iowa. Its serum manufacturing plant, principal office and place of business is located at Sioux City, Iowa (R. 229). In May 1937, it succeeded to a serum manufacturing business theretofore conducted

by the American Serum Company which was not a cooperative corporation. Respondent conducts its business in Illinois primarily through drug stores and other similar store outlets having refrigeration facilities, under a warehousing arrangement (R. 239-240). Under this arrangement the druggist or warehouseman received a shipment of serum from the plaintiff and placed it under proper refrigeration. The serum belonged to the plaintiff, and not to the warehouseman. When customers came to the warehouseman's place of business to purchase serum, the warehouseman made a record of the delivery, collected for the serum at 75¢ per 100 ccs., or 65¢ per 100 ccs., as the case might be, remitted to the plaintiff, who paid or allowed the warehouseman a handling charge, which was usually 12¢ per 100 ccs. At the time customers came to purchase plaintiff's serum they applied for membership in the plaintiff's cooperative organization and they received their share of the patronage dividend at the end of the appropriate fiscal year (R. 278-279). Most of the plaintiff's outlets were located in what was regarded as the hog-raising areas of Illinois (R. 240).

On December 7, 1936, the Marketing Agreement between the Secretary of Agriculture and the handlers of serum above referred to became effective. The first public posting of handlers' prices was to be filed with the Secretary of the Control Agency not later than December 17, 1936 (R. 686).

On December 14, 1936, petitioner, Anchor Serum Company, posted the following prices of serum with the Control Agency:

Consumers	75¢ per 100 ccs.
Dealers	63¢ per 100 ccs.
Wholesalers	51¢ per 100 ccs.
Volume Contract Purchasers	49¢ per 100 ccs.

Across the bottom of the form filed with the Secretary was typed the following legend:

> "We prepay forwarding charges. We also spend liberal allowances for advertising and sales promotion work."

On December 16, 1936, respondent filed the following serum prices with the Control Agency (R. 79):

Consumers	75¢ per 100 ccs.
Dealers	63¢ per 100 ccs.
Wholesalers	(none)
Volume Contract Purchasers	(none)

The evidence is *uncontroverted* that petitioner Anchor *did not* sell its serum to the Illinois County Farm Bureaus, through petitioner Illinois, in accordance with the 49¢ price which it posted for the "Volume Contract Purchaser" classification (R. 143). The evidence showed that from December 1936 until July 13, 1939, there existed between petitioner Anchor and petitioner Illinois, a secret and illegal system of rebates and allowances which were by them intended to and did reduce the *actual* price paid by Illinois for Anchor serum below the published 49¢ per 100 ccs. price which was filed with the Control Agency.

That is to say from December 14, 1936, until July 13, 1939, petitioner Anchor's posted price for serum sold to Volume Contract Purchasers was publicly announced as 49¢ per 100 ccs. The evidence showed, without dispute, that for the period from December 1936 until July 1, 1937, petitioner Illinois collected from petitioner Anchor a rebate of 4¢ per 100 ccs. below the said public price. This made the actual or private price to Illinois 45¢ per 100 ccs. instead of the 49¢ per 100 ccs. which was announced in the posted schedule.

Commencing on July 1, 1937, petitioner Anchor increased the amount of the rebate from 4¢ to 8¢ per 100 ccs. Thus

the secret sales price prevailing between Anchor and Illinois became 41¢ per 100 ccs. The publicly posted price remained at 49¢ per 100 ccs. The rebate continued at the 8¢ level throughout the remainder of 1937 and the early part of 1938.

Effective March 25, 1938, the amount of the rebate was again increased, this time from 8¢ to 13¢ per 100 ccs., thus making the secret Anchor-Illinois price for serum 36¢ per 100 ccs., while the publicly posted price still remained at 49¢ per 100 ccs. (R. 649, 652).

The earlier rebates had been handled by an oral arrangement. The 1938 rebate increase from 8¢ to 13¢ was represented by two, separate, written contracts.

That is to say, two contracts were written and signed. Both contracts were dated and executed on the same day, to-wit, March 25, 1938. One contract between Anchor and Illinois purported to fix the contract price for serum at 49¢ per 100 ccs. (which was consistent with the publicly posted price) and contemplated the delivery to County Farm Bureaus of a total quantity of 35,000,000 ccs. (R. 649). The second contract dealt *only* with and fixed the amount of an "allowance" for "educational and promotional activities" at 13¢ per 100 ccs. (R. 653). The record contains no explanation for the need for two separate contracts. Thus, if someone had asked either of the petitioners to submit the sales contract for inspection, it would show an apparent compliance with the posted price, whereas, by virtue of the second contract there was actually a secret discount of 13¢ for so-called "educational and promotional activities" which reduced the price from 49¢ to 36¢ per 100 ccs.

The 36¢ price for serum remained a secret arrangement between petitioners until July 13, 1939, when, as a conse-

quence of proceedings instituted by the Control Agency against Anchor, petitioner Anchor filed a revised schedule with the Control Agency, publicly announcing the price of 36¢ per 100 ccs. (R. 695).

During the period between December 1936 and March 25, 1938, the rebate was handled as a *deduction* from the face amount of the monthly statements sent by Anchor to Illinois. To illustrate: During the month of December, 1936, Anchor shipped to the various Illinois Farm Bureaus 1,178,830 ccs. of serum and 95,145 ccs. of virus, for which the total purchase price was $6,967.53. On the face of the invoice a deduction was allowed for "adv." at the rate of 4¢ per 100 ccs. on serum and 5¢ per 100 ccs. on virus, or a total deduction of $519.11, making the net amount of the invoice $6,448.42, for which petitioner Illinois sent petitioner Anchor its check in payment (R. 199).

Under date of March 25, 1938 (the date of the two written contracts) the system was changed (R. 203). Commencing on this date, petitioner Anchor sent petitioner Illinois monthly bills for serum which had been shipped by it to the various County Farm Bureaus. On their face, these statements or invoices were calculated at the public posted or contract price of 49¢ per 100 ccs. for serum, and Illinois remitted to Anchor accordingly. However, each month, petitioner Illinois would bill petitioner Anchor for the amount of the rebate, *i. e.*, 13¢ per 100 ccs., describing the charge in its bill as "compensation for promotional services per agreement." Anchor then sent Illinois a check for the appropriate amount (R. 711). To illustrate: On April 14, 1938, petitioner Illinois billed petitioner Anchor for the sum of $455.01, which included a rebate of 13¢ per 100 ccs. on account of serum shipped for the last six days during March. On April 15, 1938, petitioner

Anchor sent petitioner Illinois its check in payme
Illinois statement. This method continued in fo
July 13, 1939, when Anchor changed its public pos
to Volume Contract Purchasers from 49¢ per 100 c
per 100 ccs. and the private rebate system was a
(R. 695).

The evidence showed, without dispute, that dur
out of a total quantity of 29,463,925 ccs. of serum p
that year by Illinois from all suppliers, Anchor su
Illinois County Farm Bureaus 15,007,925 ccs. and i
petitioner Illinois deductions from invoices
$8,666.83.

During the calendar year 1938, out of a total
of 35,681,600 ccs. of serum purchased by Illinoi
Farm Bureaus from all suppliers, Anchor supplie
250 ccs. and paid petitioner Illinois rebates
$39,044.30.

For the year 1939, out of total purchases fron
pliers of 39,354,325 ccs. of serum, Anchor supplie
County Farm Bureaus with 24,716,250 ccs. of se
during the period from January 1, 1939 to July
collected in rebates from petitioner Anchor the
of $32,188.35 (R. 753, 1115).

In their statement of "some of the material fa
case," petitioners have sought inferentially to jus
allowances as constituting orthodox advertising
promotional expenditures (Pet. pp. 5-6).

The evidence was *uncontroverted* that, accord
books of account of each of the petitioners, ne
tioner treated the amount of the rebate as cons
real expenditure for advertising or sales pron
pense. Each treated the rebates merely as a
reducing the price of the serum. In the case of t

books of account, the total of the moneys which it either had credited or paid each month to petitioner Illinois, for the period 1936-1939 were credited to the regular sales account of petitioner Illinois. That is to say, Anchor did not treat the allowance as an advertising expense (R. 197). In the case of Illinois the entries on its books of account showed that it, too, considered the rebates which it received as serving to reduce the price which it paid for serum. According to a statement of the *cost* of serum taken from the books of petitioner Illinois and admitted at the trial to be true and correct, its average cost for 1936 was 37¢ per 100 ccs.; for 1937, 42¢ per 100 ccs.; for 1938, 37¢ per 100 ccs.; and for 1939, 36¢ per 100 ccs. (R. 221, 751). The books of account of petitioner Illinois showed, for example, that during 1937, although it had deducted $8,666.83 from Anchor's statements for "adv." its books showed that it only expended for advertising the sum of $648.53 (R. 749, 1115). During 1938, petitioner Illinois received $39,044.30 from petitioner Anchor for "adv." or "educational or promotional expense." However, according to its own books, it expended that year for "advertising and promotion" the sum of $611.77 (R. 749, 1115). Between the dates of January 1 and July 15, 1939, Illinois received from Anchor the sum of $32,188.35, but according to its own books the total sum expended by it during the entire year for "advertising" and "promotion" was the sum of $1,236.97 (R. 749, 1115). The motion picture, "Swine Insurance," referred to in petitioner's statement (Pet. p. 6), was produced in 1939 at a total cost, according to the books, of $2,290.27.

As a matter of fact, the *total actual operating expense* of petitioner Illinois for management, salaries, traveling, telephone, advertising, etc., during the years 1936-1940, was not more than from $4,000 to $6,000 per year (R. 749).

Having examined the figures shown by statements to have constituted Illinois' sales of serum and its advertising expense, respectively, for the years 1936-1940, an accountant witness for the respondent testified that Illinois' advertising expense for the year 1936, in terms of 100 ccs. of serum, was 2/10 of 1¢; for 1937 it was 13/100 of 1¢; for 1938 it was 17/100 of 1¢; for 1939 it was 8/10 of 1¢ (R. 299-300). The minutes of the Board of Directors of Illinois indicated that the directors regarded the rebate merely as a means or device for achieving or obtaining a *net* price (R. 759).

Another circumstance bearing on the propriety of the alleged "advertising" allowance, and likewise pointing to the extent to which Anchor went in order to preempt the serum market in Illinois, is reflected in its relationships with Fidelity Laboratories, Inc. The latter is a serum manufacturing corporation located at Chicago, Illinois. Although for the five-year period 1936-1940 (both inclusive) Anchor was the largest individual supplier of serum to petitioner Illinois, the Fidelity Laboratories had been one of four suppliers during the year 1936 (R. 753). In certain counties in Illinois serum manufactured by the Fidelity company could be delivered with a good deal more promptness than if it were to be shipped from the Anchor plants at St. Joseph, Missouri (R. 163). Fidelity serum had come to be favorably regarded by some of the County Farm Bureaus. In any event, in the written contract of March 25, 1938, Anchor agreed with Illinois that for such County Farm Bureaus as wanted Fidelity serum Anchor would purchase such serum from Fidelity and deliver it *at the same price* as that charged Illinois for the Anchor serum (R. 766). The evidence showed that during the year 1938, Fidelity Laboratories delivered 2,529,000 ccs. of serum to various County Farm Bureaus in Illinois (R.

144). *Anchor paid Fidelity 40¢ per 100 ccs. for such serum (R. 145).* Anchor also allowed Illinois the so-called "advertising" rebate on such serum. Thus it sold such serum to Illinois at the net price of 36¢ per 100 ccs., which was 4¢ less than the price Anchor had paid to Fidelity for such serum (R. 145).

The evidence showed that the system of illegal rebates, discounts, and the discriminatory and unlawful prices which resulted therefrom, were successful in ousting all the suppliers of serum from dealings with the County Farm Bureaus in Illinois and resulted in making Anchor serum virtually the only product sold by County Farm Bureaus in this State. Exhibits in evidence show: that in the years 1936 and 1937, Anchor supplied over 50 per cent of the serum purchased by Illinois County Farm Bureaus through petitioner Illinois and was one of four manufacturers supplying such serum. In 1938, Anchor supplied over 85 per cent and was one of three manufacturers. In the years 1939 and 1940 petitioner Anchor became the *only* serum manufacturer supplying serum to the Illinois County Farm Bureaus and it purchased serum from Fidelity Laboratories at a loss in order to be in a position so to do (R. 753).

When petitioner Anchor posted its list of prices with the Control Agency this constituted a public certification of its prices prevailing to those classifications listed (R. 693). In such posting, over the signature of W. J. Kennedy, its vice president and sales manager, *said defendant publicly announced, and therefore for the purposes of this litigation it is estopped to deny,* that its price to *all* so-called Volume Contract Purchasers was 49¢ per 100 ccs. The *uncontradicted* evidence in this case is, that, instead of selling to defendant Illinois at its publicly posted price of 49¢, it sold serum to Illinois at a price of 45¢ from December 1936 until July 1937, at a price of 41¢ from

July 1937 to March 1938, and at 36¢ from March 1938 until July 1939. Such prices were inconsistent with the price announced as offered *all other* Volume Contract Purchasers and therefore became discriminatory. Under the provisions of Title 15, § 13(b), a lack of uniformity in Anchor's prices to purchasers answering the volume contract purchaser qualification having been shown in the plaintiff's case, the burden of proof then shifted to petitioner Anchor to justify or explain its price to Illinois. *No such burden was either attempted or discharged. No explanation was furnished.* The defense consisted entirely in an attack on the respondent and its motives in instituting the litigation.

Plaintiff's posted price to its consumers of 75¢ per 100 ccs. was the generally prevailing price charged by all serum manufacturers to consumers.

During January 1937, following the posting of its consumer price, plaintiff received complaints from its Illinois warehousemen to the effect that they were not able to sell plaintiffs serum at 75¢ because the County Farm Bureaus were selling Anchor Serum (purchased under the illicit arrangement above described) at 65¢ (R. 285, 289, 313, 315, 293, 294). In order to meet the competition from County Farm Bureau units and hold its own customers and protect its market, plaintiff therefore instructed its warehousemen to reduce its consumer price in those areas where it was necessary to meet the Farm Bureau competition and to prevent a destruction of the respondent's business in Illinois by the transfer of the allegiance of its members to the Anchor product (R. 279, 280).

Respondent produced, identified and offered in evidence its original ledger sheets showing the accounts of 36 of its warehousemen wherein it had received 10¢ per 100 ccs. less for its serum, in order to meet the kind of competition

fostered by the illicit arrangements referred to above (R. 787, 974). An accountant summarized all of the entries on such sheets, where such allowances had been made. For the period from January 1, 1937 to July 13, 1939, this amounted to the sum of $4,449.31, and this amount, being trebled, constitutes the basis for the judgment affirmed by the Circuit Court of Appeals (R. 1165, 1267).

The evidence in this case is *uncontradicted.* The defenses asserted by the petitioners related to various propositions of law, and may be summarized as follows: (1) that they are exempt from the Anti-Trust Laws and under the Serum Marketing Act they could do "with immunity what the Anti-Trust Laws forbade" (Pet. p. 18, 20); (2) that certain of the evidence offered by respondent relating to damages was hearsay and therefore incompetent (Pet. p. 26); (3) that the entry of judgment n.o.v. was a denial of jury trial (Pet. p. 32); (4) that it was error to hold that petitioners had the burden of proof of justifying the discriminatory price (Pet. p. 34); (5) that respondent was guilty of "unclean hands" (Pet. p. 37); (6) that respondent had no right to sue as a corporate entity (Pet. p. 40).

ARGUMENT.

Petitioners were not exempt from the Anti-Trust Laws and could not do "with immunity what the Anti-Trust Laws forbade." Simply stated, petitioners contend that they were exempt from actions which might be brought against them under the Anti-Trust Laws because the petitioner Anchor was a party to the Marketing Agreement between the Secretary of Agriculture and the handlers of serum (Pet. p. 18). As a subsidiary argument, petitioner Anchor

contends that even if it sold serum at a price which was discriminatory and contrary to its published price, the *only* proceedings which might be taken against it were under the Marketing Agreement (Pet. p. 39). These contentions are based entirely on the ground that the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act, after first granting the power to the Secretary of Agriculture to enter into a marketing agreement with handlers of serum, goes on to provide: "* * * the making of any such agreement shall not be held to be in violation of any of the Anti-Trust laws of the United States and any such agreement shall be deemed to be lawful."

The answer to petitioners' contention is that the *only* exemption granted by the statute is in respect to the act of the *making* of the Marketing Agreement between the Secretary of Agriculture and the handlers or manufacturers of serum. This point has already been decided against petitioners in the case of *United States* v. *Borden*, 308 U. S. 188, 198, where the exact language here involved was interpreted by this Court contrary to petitioners' views. In the *Borden* case, an indictment against (1) a number of milk distributing corporations, their trade association, and bottle exchange, (2) a cooperative association of milk producers, (3) a drivers' union, (4) municipal officials, and (5) arbitrators of disputes charged violations of the Anti-Trust Laws. On demurrer it was contended that the effect of language (identical with that here involved) in the Marketing Agreement Act of 1937 (legislative successor to the A. A. A.) was to remove the production and marketing of milk from the purview of the Anti-Trust Laws. The District Court had held that the mere adoption by the Congress, of the Marketing Agreement Act, operated to remove any such agricultural products from the Anti-Trust Laws, and to vest complete authority in the Secretary of Agriculture. This Court re-

jected the contention and reversed the District Court. It said, *United States* v. *Borden*, 308 U. S. 188, at page 198:

> "We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create 'so great a breach in historic remedies and sanctions.' ".

The Serum Marketing Agreement *did not* give permission to handlers to grant rebates, create discriminatory prices, or engage in unfair trade practices. The petitioners therefore not only violated the Anti-Trust Laws, they violated the Marketing Agreement as well. Their contention is, that the statute exempted them from the actions under the Anti-Trust Laws, but, as this Court has already decided, Congress did not intend to create "so great a breach in historic remedies and sanctions." The *only* exemption granted by the Congress was in respect of the act of *entering into the Agreement with the Secretary.* Examination of the legislative history makes this quite clear.*

Petitioner Anchor asserted in its pleadings prior to trial, and at the trial made an offer of proof which was

* See remarks of Senator Norris in connection with the enactment of the A.A.A., Cong. Rec. Vol. 77, Part 2, pp. 1159-2300. 73rd Congress, 1st Session, with particular reference to remarks at page 1970.

rejected, to the effect that after it had filed a corrected price list on July 13, 1939, the Secretary of Agriculture on September 12, 1939, dismissed a complaint against Anchor that had been filed with him by the Control Agency. The argument is advanced that the Secretary's administrative action was in effect a species of *res adjudicata*, "should be conclusive on all parties" (Pet. p. 39) and operates to prevent the plaintiff from initiating civil remedies afforded by the Anti-Trust Laws. The argument is a corollary to the argument that petitioners were exempt. What has been said above is applicable alike to this argument. The exemption granted was very limited and very narrow and extended only to the *making* of the Marketing Agreement. Remedies afforded were therefore supplementary to each other. The cases of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49-52, and *Macauley et al.* v. *Waterman Steamship Corp.*, 90 L. Ed. Advance Sheet 11, at page 676, cited by the petitioners, are not in point. These are cases where the basic legislation specifically granted *exclusive* jurisdiction to an administrative agency; in the one case the N.L.R.B., and in the other, a Maritime Renegotiation Commission. That is not the case here.

The illicit rebate arrangements between Anchor and Illinois also constituted a clear-cut violation of Title 15, § 13(c). This section of the Anti-Trust Laws provides that it shall be unlawful for any person engaged in commerce, "to pay or grant, or to receive or accept, anything of value as a commission, broker's or other compensation, *or any allowance or discount in lieu thereof*, except for services rendered in connection with the purchase of goods, wares, or merchandise, either to the other party to such transaction *or to an agent, representative or other intermediary therein*, where such intermediary is acting in fact for or in behalf, or is subject to, the direct or indirect control of any party

to such transaction, other than the person by whom such compensation is paid or granted." (Italics ours.) This particular section, which was added by the Robinson-Patman Act in 1936, does *not* require any proof that the practice followed had any effect on competition. It was intended by the Congress to strike at the practice of those who controlled tremendous buying power, demanding that substantial "discounts" or "allowances" be paid either direct to themselves, or to some employee, or agent controlled by the buyer, but purporting to act as a sort of middleman in the transaction.

In this case, petitioner Illinois was really nothing more than a corporate "purchasing agent" for the approximately 100 County Farm Bureaus scattered throughout the State of Illinois. Its articles of incorporation provided that its object was "to act as agent for its members in collectively purchasing, handling and distributing" serum and virus (R. 723). Its by-laws so provided (R. 727). A contract between Illinois and its members recited that it was formed to provide a "central purchasing service". Under this agreement the member County Farm Bureau appointed and constituted Illinois "its sole and exclusive agent" to bargain for and purchase said serum and the member agreed *not* to buy its serum from any other source (R. 744). Furthermore, each member agreed to maintain a uniform retail sales price, determined, *not* by the member, but by the petitioner Illinois (R. 745). As such "agent", under the provisions of Title 15, § 13(c), petitioner Illinois was clearly ineligible to receive from the petitioner Anchor any "discount" or "allowance" or "commission" however it was disguised or by whatever name called. Application of this section of the Anti-Trust Laws does not even depend on proof that the practice complained of had any tendency to lessen competition or cre-

ate monopoly. This section has been upheld and applied uniformly by all Circuits in the cases of *Biddle Purchasing Co.* v. *Federal Trade Commission,* 96 F. (2d) 687, *cert. denied* 305 U. S. 634; *Oliver Bros.* v. *Federal Trade Commission,* 102 F. (2d) 763; *A. & P. Tea Co.* v. *Federal Trade Commission,* 106 F. (2d) 667, *cert. denied* 308 U. S. 625, and *Quality Bakers of America* v. *Federal Trade Commission,* 114 F. (2d) 393.

Petitioners' contention that certain evidence was incompetent fails to recognize a settled exception to the hearsay rule. At the trial petitioners argued that the testimony of Messrs. Huff and Davis, officials of the respondent, as to the reasons assigned to respondent by their various druggists why the latter could not sell respondent's serum at 75¢, and which resulted in respondent's reduction in price, was hearsay and incompetent. Such testimony constitutes an exception to the hearsay rule and its admissibility has been sustained in both civil and criminal cases arising under the Anti-Trust laws. (Wigmore, 3d Ed., Vol. 6, § 1729, p. 91.) It was admissible to show the *reason* assigned and given to the respondent by its warehousemen-druggists when requesting a reduction in price from respondent. Cases of this type are analogous to "loss of custom" cases and it was clearly competent for officials of the plaintiff to testify that they received such complaints, what they consisted of, and what the respondent did in reliance thereupon. In the case of *Lawlor* v. *Lowe,* 235 U. S. 522 (the so-called "Danbury Hatters" case) certain non-union employers brought an action under the Sherman Act against certain unions, and after extended litigation, recovered a verdict in damages. In that case, *salesmen for the plaintiff* had testified at the trial *as to the reasons given to them* by customers on whom they called, for refusing to purchase hats made by plaintiff. (See 235 U. S., at page 532.)

The admission of such testimony was assigned as error on the same grounds urged here. (See 235 U. S., at page 527.) Mr. Justice Holmes made short work of the contention. He said (235 U. S., at p. 536):

> "The reason given by the customers for ceasing to deal with sellers of the Lowe hats, including letters from dealers to Lowe & Co., were admissible. 3 Wigmore, Evidence, § 1729 (2)."

Similar decisions supporting the rule are the cases of *Kimm* v. *Steketee*, 48 Mich. 322, 12 N. W. 177; *Weston* v. *Barnicoat*, 175 Mass. 454, 56 N. E. 619; *Brannen* v. *Bouley*, 272 Mass. 67, 172 N. E. 104; *Hubbard* v. *Allyn*, 200 Mass. 166, 86 N. E. 356; *Greater New York Live Poultry C. of C.* v. *United States* (C. C. A. 2), 47 F. (2d) 156, 159. The state of mind of the dealers in respondent's products was proved by such declarations, and for such purpose the testimony was clearly admissible.

The entry of judgment n.o.v. did not deny petitioners trial by jury. Under Rule 50 of the Federal Rules of Civil Procedure, district courts, where the state of the evidence warrants, have the right to either direct verdicts or set aside jury verdicts for either plaintiff or defendant and enter judgment accordingly. As early as the decision in the case of *Delaware L. & W. R. R.* v. *Converse*, 139 U. S. 469, 472, this Court said: "* * * it is well settled that the court may withdraw a case from them (jury) altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it." The decisions in the cases of *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, and *Galloway* v. *United States*, 319 U. S. 372, 389, hold that the exercise of

such power by a district court does not constitute an invasion of the right of jury trial, since trials at the common law contemplated the exercise of that right by the judge. Where, as here, the evidence is such that there can be but one reasonable conclusion as to the proper verdict the Court must determine the issues accordingly. In this case, reasonable minds could not differ as to the result to be reached—unless evidence is completely ignored. *All of the respondent's evidence was undisputed.* There was no controversy in the evidence with respect to the relationships prevailing between the petitioners from December 1936 until July 1939. There was no dispute as to how the net price Illinois paid for its serum was arrived at. Neither of the petitioners offered any evidence to justify the discriminatory and favorable price granted to Illinois. Nor was there any controversy in the evidence as to the steps which were taken by the respondent in order to protect itself. Petitioners claim that such steps were unnecessary, but there is no testimony which contradicts the fact that such steps were taken by the respondent. The matter of the amount of damage was a mere matter of computation. To prove the amount it had been damaged respondent produced in court its original books and records, consisting of (a) four volumes of original orders, (b) a bound book of credit memos, and (c) its original ledger sheets pertaining to each of the particular druggists involved. These were properly identified and offered in evidence in accordance with Federal Statutes (28 U. S. C. A. 675). Furthermore, prior to the trial of the cause, under a stipulation of the parties, accountants for the petitioners had been given access to all of the respondent's financial books and records for the period from January 1930 to March 1942 (R. 121). Such accountants for the petitioners made an examination of the respondent's books and records, including those produced at the trial (R. 121, 359). As a result of such

examination, complaint was made at the trial of bookkeeping errors amounting to a total of $129.13 (R. 328). This amount was conceded by the respondent, and respondent's claim was reduced by that amount, and the *amount* of damages removed from the field of controversy. The courts have consistently entered verdicts for specified amounts when there has been no real issue in respect thereto, or where, as here, the amount is merely a matter of computation, or there is no evidence or defense raising a contest as to the amount claimed, or the defense thereto has failed. 105 A. L. R. 1076; *Jacobi Hardware Co.* v. *Vietor, et al.*, 11 F. (2d) 30, 33; *Selden* v. *Lee* (App., D. C.), 3 F. (2d) 335, 336; *Globe & Rutgers Ins. Co.* v. *Prairie Oil & Gas Co.*, 248 Fed. 452, 458.

The burden of proof was on petitioners to justify the discriminatory price granted to Illinois. Petitioners claim that the Circuit Court has changed the rules of the common law with respect to the burden of proof and has thus departed from the usual course of judicial proceedings. This argument follows from the failure of the petitioners to appreciate, that, under the provisions of the Anti-Trust Laws, he who grants or maintains a discriminatory price must be prepared to justify such price (or practice leading thereto) when and if challenged. Thus, under § 13(a) it is declared to be unlawful for any person to create price discriminations, *provided*, that nothing contained in such section prevents differentials which make *only* due allowance for "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." It is well settled law that he who would claim the benefit of a *proviso* in a statute undertakes the burden of bringing himself within the same. That is ancient law. It was applied in a virtually identical situa-

tion in the case of *Ladoga Canning Co.* v. *American Can Co.*, 44 F. (2d) 763, cert. den. 282 U. S. 899. Neither of the petitioners undertook any such burden in this case. Furthermore, as the Circuit Court pointed out, the intention of the Congress to fasten the burden of proof on he who is charged with granting a discriminatory price, is made perfectly clear in § 13(b), where, dealing with proceedings before the Federal Trade Commission, the statute provides *specifically* that the burden of proof shall be that of the erring seller. The Circuit Court made no change in well settled rules of the common law.

Respondent was not guilty of unclean hands. There is no important question of Federal law to be decided. Another defense pleaded in the answers of both petitioners, overruled by the District Court for insufficiency as a matter of law, and argued by the petitioners (Pet. p. 37) asserts the application of the "clean hands" doctrine. It is said that because respondent, in defense of its Illinois market, met the petitioners' kind of competition by instructing its Illinois outlets to sell serum at 65¢ wherever necessary to meet that competition, it violated its own posted price of 75¢ posted with the Control Agency. The so-called "clean hands" doctrine has certain limitations. "The rule that a complainant must come into equity with clean hands means that he must do equity as respects the defendants' rights in the particular matter of the suit. . . . If he is not guilty of inequitable conduct *toward the defendant* in that transaction his hands are as clean as the court can require." *Carpenters' Union* v. *Citizens Committee*, 333 Ill. 225, 250. *Nothing that this respondent did or said was responsible for the illegal arrangement that existed between the two petitioners.* Respondent was the victim and not the perpetrator of the illegal arrangement. The defense of "unclean hands" is not available

to those whose conduct invited the act or acts alleged to constitute the "unclean hands." So here, respondent's reduction in price in Illinois, even if not in accordance with its posted prices, made to protect its own Illinois market and having been the consequence of the illicit system which prevailed between the petitioners, they are estopped to assert the maxim. *Van Antwerp* v. *Van Antwerp,* 242 Ala. 92, 99; *Langley* v. *Devlin,* 95 Wash. 171, 186. Finally, the Congress recognized this principle, by providing in the Robinson-Patman Act, under which this suit is brought, that a seller may rebut a charge of price discrimination by showing that it was the result, in a particular case, of seeking to meet an equally low price of a competitor (§ 13(b)). So far as the respondent was concerned, such was the case here.

Respondent had the right to maintain this action. Another defense pleaded in the amended answers of both petitioners, overruled by the District and Circuit Courts, asserts that the respondent, as such, cannot maintain the action because, in the view of the petitioners, the cause of action for damages under the Anti-Trust Laws is one to be asserted by the individual members of the respondent, and not by the respondent as a corporate entity. It is claimed that the decision here is in conflict with the decision in the case of *Farmers Cooperative Oil Company* v. *Socony Vacuum Oil Co.,* 133 F. (2d) 101. Petitioners base their argument on the philosophy that if the respondent was required to reduce its consumer price in Illinois, in order to protect its market in this State, the loss was suffered by its members. The error in this reasoning is that it hurdles the fact that the respondent, as the corporate entity, would, as in the case of all normal sales, have been first entitled to collect in all monies due on the sales of its product. The individual members of the

respondent would acquire no right in proceeds of sales until, in due course, *after* payment of corporate charges and expenses, the action of the respondent's board of directors had fixed the amount of the patronage dividend. Until and unless a cause of action has been "passed on" by the cooperative entity to its individual member, the cooperative corporate entity has just as much right to seek to enforce and collect the proceeds of a cause of action for damages against a tort feasor, as it would to seek to collect the amount of a sale on credit, or for any other property damage. It has been held in several states, which make provision in their respective statutes for the creation of cooperative corporations, that: "The association has indeed a legal entity of its own; it is a corporation but not a corporation for gain; it may make and enforce contracts with its own members and with others; it may buy and sell; sue and be sued." *Kansas Wheat Growers Assn.* v. *Sedgwick County,* 119 Kan. 877, 244 Pac. 466; *California Canning Peach Growers* v. *Downey,* 76 Calif. App. 1, 243 Pac. 679.

The *Farmers* case cited by petitioners, presented an entirely different situation. There the cooperative was a "buying" cooperative. There the cause of action had been "passed on" with the product to each of the members of the cooperative. In the *Farmers* case, both the plaintiff cooperative entity, *and* its individual members had been compelled to pay an extra 2¼¢ per gallon for gasoline purchased from the defendant. In the *Farmers* case, since the plaintiff entity, through the sale of the gasoline, had "passed on" the increased price to its members, the court held that the cause of action to recover such illegal increase had also been "passed on" to the individual members. Here, no part of the claim against the petitioners has yet been "passed on" to the individual mem-

bers, and therefore the two cases are not at all alike on their respective facts.

Conclusion.

The evidence in this case clearly and unequivocally established that a manufacturer of serum and a vendor of such serum confederated to frustrate both the Anti-Trust Laws and the Control Agency set up under the Marketing Agreement, by making secret and illegal rebates, producing a discriminatory price in favor of the vendor. The practices proved tended with certainty to lessen competition, drive all others from the market, and tended toward the creation of monopolies for each—the one to vend in, and the other to supply the serum for, a market to be controlled by both. Respondent was compelled to reduce its consumer price in order to protect itself and its Illinois market against the consequences of the illegal arrangement between petitioners. The evidence being undisputed, it is respectfully submitted that any other result than a judgment for the respondent would have been a denial of justice.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

Nos. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION,
a corporation of Illinois,
Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION,
a corporation of Iowa,
Respondent.

ANCHOR SERUM COMPANY'S SEPARATE PETITION FOR REHEARING OF THE ORIGINAL JOINT PETITION FOR WRITS OF CERTIORARI.

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CHAMPLIN-SNEALY COMPANY, CHICAGO 368

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ANCHOR SERUM COMPANY'S SEPARATE PETITION FOR REHEARING OF THE ORIGINAL JOINT PETITION FOR WRITS OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This petitioner submits that the original petition either failed to clearly or fully present the grounds and reasons for this Court to take jurisdiction or that this Court overlooked or misapprehended certain material matters therein contained. Petitioner therefore presents this petition for a rehearing of the original petition for writs of *certiorari*. In so doing, this petitioner adopts and makes a part hereof said original petition.

I.

THE JUDGMENT RENDERED BY THE MAJORITY OF THE CIRCUIT COURT OF APPEALS DEPRIVES PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

In the presentation of this question, for the sake of argument only, and for no other purpose or purposes whatsoever, it can be admitted that the acts of both petitioners were unlawful and in fact violated the Robinson-Patman Act. It can further be admitted, for the same purpose, that no immunity under the Serum and Virus Act was created in favor of the petitioners. It is submitted, however, without fear of successful contradiction that the evidence tending to establish that petitioners violated the Robinson-Patman Act is no evidence whatsoever that the acts of the petitioners, of which the respondent complains, in any way damages the respondent or in any way necessitated or required the respondent to reduce the selling price of its serum.

We again assert without fear of successful contradiction that it is settled beyond peradventure by the decisions of this Court and of the other federal courts in the Union rendered pursuant thereto, that no litigant can recover damages from a defendant based only upon the premise that the defendant's acts, of which complaint is made, were unlawful or in violation of the federal law.

It is equally well settled that to entitle such a litigant to recover, the litigant has the burden in such actions to prove by creditable evidence, clearly and convincingly, that the unlawful acts of the defendant or defendants which were in violation of the federal act directly damaged the plaintiff, and with equal clarity the amount of such damages. (See

cases cited on page 16 of this petition.) This is especially true where a litigant sues to recover high penal damages, such as triple damages under the anti-trust laws.

The only evidence of any kind and character introduced by respondent attempting to prove that the alleged wrongful acts of petitioners damaged respondent was the testimony of respondent's president and assistant sales manager to the effect that some of their Illinois druggists, whether they be called dealers or warehousemen, complained that they could not sell respondent's serum because the Farm Bureaus in Illinois were selling serum at 65¢, and that these officers, acting for respondent, instructed the druggists to meet the competition. (R. 242, 243, 279, 280, 284, 285, 293, 294.)

These witnesses never at any time talked to a single consumer who was a customer, patron or alleged and purported member of respondent. (R. 313 to 315, inclusive.) This evidence could rise to no higher dignity than these witnesses testifying as to what their druggists told them as to what their alleged customers, patrons or members said. It was properly classified by Judge Major in his dissenting opinion as being hearsay heaped upon hearsay. If any part of this testimony rises out of the ranks of hearsay heaped upon hearsay, and it was very slight at that, it amounted to nothing more than the opinionated, self-serving statement of these witnesses.

Although respondent's druggists or dealers were accessible at the time of the trial, as were also its alleged customers, patrons and members, the respondent never called as a witness a single druggist or single customer or member. The reason is obvious. Evidently the plaintiff could not prove by any druggist or any customer of serum that the activities of the County Farm Bureaus in selling serum to their members affected in any way the sale of respond-

ent's serum. Certainly had such condition and facts existed, clear, direct and positive evidence could have been procured from the lips of these druggists and from these customers or members who were in any way affected by the price at which the Illinois Farm Bureaus sold to their members only.

Practically the most of this hearsay and incompetent testimony was given by respondent's president, who stood before the court below and stands now in this record discredited and impeached, as will be shown in the succeeding point.

It will likewise be shown in the succeeding point that all the creditable evidence with any probative force and effect establishes that the acts of the petitioners, of which complaint is made, in no way damaged the respondent or necessitated or required respondent to reduce its price.

As we contended in our original petition, it is undoubtedly true that under the principles announced by this Court in the case of *Buckeye Powder Co.* v. *Dupont De-Nemours Powder Co.*, 284 U. S. 55, 63 L. Ed. 123, this hearsay, opinionated evidence was not admissable in any way as evidence that the acts of petitioners damaged the respondent. There is not a scintilla of evidence that any customer, patron or purported member of respondent ever ceased buying respondent's serum and purchased serum from the Illinois Farm Bureaus, or refused to purchase respondent's serum at 75¢. Neither is there any evidence that druggists actually ever sold respondent's serum for less than 75¢ to respondent's customers or purported members.

In fact, unless purchasers were members of the Farm Bureau, they could not purchase serum from them. Therefore, there was no necessity for the introduction of any evi-

dence to show the motive of any alleged customer, patron or purported member of respondent in ceasing to buy respondent's serum. Even if it had been competent for that purpose, it would still be of no force and effect as evidence to show that the acts of which complaint is made damaged the respondent or necessitated respondent reducing its selling price.

Clearly, therefore, with the exception of this incompetent hearsay evidence, a search of the record with a magnifying glass will fail to disclose another scintilla of evidence showing or tending to show that the acts of the petitioners in any way damaged respondent. This must be conceded. A careful reading of respondent's brief in resistance to the original petition will show that it likewise failed to call the court's attention to a single scintilla of evidence other than this hearsay evidence, and which is set out on page 18 of respondent's brief. The evidence cited in respondent's brief to sustain respondent's contention that petitioners' acts violated the Robinson-Patman Act is evidence in no way that these acts damaged the respondent. If the record contains any other evidence on this question, respondent concededly did not call it to the attention of this Court in its brief of resistance.

We submit that for the judgment of the majority of the Court of Appeals to become final, these petitioners' property, in violation of the Federal Constitution, will have been taken without due process of law.

We further submit that this constitutional question makes it imperative for this Court to take jurisdiction and grant the writs of *certiorari*, for otherwise the door will be wide open for nefarious litigants with avaricious desires and itching palms and with a conscience easily comforted to prey upon the legitimate business interests of our Nation.

II.

PETITIONERS BY THE JUDGEMENT OF THE MAJORITY OF THE COURT OF APPEALS WERE DENIED A TRIAL BY JURY AS GUARANTEED BY THE SEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Certainly it must lie within the realms of a truthful statement to say that if the record in this case presented a question of fact for the determination of a jury, then petitioners by the judgment complained of have been denied a trial by jury.

In the case of *Gunning* v. *Cooley,* 281 U. S. 90, 74 L. Ed. 720, this court on page 94 of 281 U. S. and page 724 of 74 L. Ed. said:

> "*Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury.*" (Emphasis ours.)

In the case of *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U. S. 555, 75 L. Ed. 544, this Court reversed the judgment of the Circuit Court of Appeals for the First Circuit, which vacated a judgment of the District Court of the United States for the District of Massachusetts in favor of the plaintiff, which was a suit brought for triple damages under the anti-trust laws. This Court affirmed the judgment of the lower court rendered upon a verdict of the jury and on page 566 of 282 U. S. and page 550 of 75 L. Ed. said:

> "*Whether the unlawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value, was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' Milwaukee & S. P. R. Co.* v. *Kellogg,* 94

U. S. 469, 474, 24 *L. ed.* 256, 258. *And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite couclusion from the facts.*" (Emphasis ours.)

In the case of *The Richmond & Danville Railroad Co.* v. *Powers,* 149 U. S. 43, 37 L. Ed. 642, this court on page 45 of 149 U. S. and page 643 of 37 L. Ed. said:

> "*It is well settled that where there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.*" (Emphasis ours.)

In the case of *The Sioux City & Pacific Railroad Company* v. *Stout,* 84 U. S. 657, 21 L. Ed. 745, this court many years ago on page 664 of 84 U. S. and page 749 of 21 L. ed. said:

> "*It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge.*" (Emphasis ours.)

The question is therefore presented as to whether or not the judgment of the Court of Appeals in the case at bar, affirming the action of the District Court in setting aside the verdict of the jury in favor of petitioners and rendering judgment in favor of respondent n. o. v. violated these well settled principles of law. If the action of the Court of Appeals is contrary to and in direct conflict with these decisions of this Court, and these well settled principles of law, then clearly the judgment of the Seventh Circuit Court of Appeals denied petitioners their constitutional right of a trial by jury.

It therefore becomes necessary in order to fully present this constitutional and jurisdictional question, which we evidently failed to clearly do in the original petition, to analyze this case from a factual standpoint.

The analysis of the evidence presents the following factual picture.

The only evidence offered to show that petitioners' acts damaged respondent.

As we pointed out in the preceding division—

1. The only evidence offered by the respondent on this question was the incompetent hearsay, opinionated and self-serving evidence of the respondent's president Huff and assistant sales manager Davis to the effect that they received complaints of competition in that the Illinois Farm Bureaus were selling serum at 65¢ and respondent instructed the drug stores complaining to meet the competition and reduce the selling price of such serum to such drug stores from 63¢ to 53¢. (R. 293, 294, 242, 243, 284, 285, 289.) This constituted all the evidence offered by respondent on this question.

Respondent's President Huff stood in the court below and now stands discredited and impeached.

1. Huff first testified that he did not believe and could not recall any instance where respondent reduced its price in any other state than Illinois (R. 354) (This evidence, the trial court held admissible on the question as to whether respondent was required to reduce its prices in the State of Illinois on account of the Farm Bureau competition. R. 357, 358) Huff later admitted, on further cross-examination, that at least in certain towns in Iowa respondent made a reduction of 11¢ per 100 ccs. in its prices to the drug stores, among other things, to pay veterinarians to help and assist farmers to vaccinate and administer the

serum, which he testified he classified as sales expense instead of expense for educational and promotional purposes. (R. 356 to 360, incl., 373 to 375, incl.)

2. Huff first testified that in Illinois when respondent reduced its prices to druggists from 63¢ to 53¢, it never increased the price. Later in his cross-examination he admitted that with reference to at least eight of respondent's drug stores, after respondent had made sales to them at 53¢, it made substantial sales at 63¢. (R. 336 to 353, incl.) With reference to one drug store, the Washburn Drug Store at Colfax, Illinois, after reducing its price to 53¢, it increased it from 53¢ to 63¢, at which price it sold this drug store, 302,875 ccs. (R. 351 to 353, incl.) This was one of the thirty-six drugstores for which respondent made claim for loss and damage. (R. 975 to 978, incl.)

3. Huff first testified that he had personal knowledge of the prices at which manufacturers generally were selling serum to consumers, which was 75¢. (R. 243, 244) In cross-examination he admitted that when he so testified that all he knew was what their posted prices were. (R. 286)

4. Respondent's President Huff first testified that he believed one or two of their druggists ceased purchasing respondent's serum and purchased from the farm bureaus, but later in cross-examination admitted that this was not true, but stated that the farm bureaus' prices was one of the arguments used by the druggists to get respondent's prices down. (R. 288, 289) The evidence is without dispute that neither the petitioner Illinois nor the farm bureaus sold serum to drugstores. (R. 580)

5. A reading of the record will disclose the willingness of Huff to at all times testify to any fact he believed would aid respondent's cause.

Respondent's evidence upon the amount of its alleged and purported damages.

1. The only evidence offered by the respondent was a tabulation "Plaintiff's Exhibit PP" prepared by and offered in evidence by the witness Taylor, a certified public accountant. (R. 332 to 335, incl. 975 to 978, incl.)

2. This witness, who knew nothing about the correctness or authenticity of the records, testified that in preparing this tabulation he did so under the instructions of Mr. Huff and took the information that Mr. Huff gave him and that he did not know when the pencil memorandums were made on the record showing that the price of serum had been reduced, or who made them. (R. 326) The respondent's President Huff was not under oath when he gave the instructions and information to the witness Taylor.

3. The witness Taylor admitted that with reference to eight drug stores respondent claimed a damage of 10¢ per 100 ccs. on more serum than the respondent sold to such drug stores during that particular period. (R .317 to 326, incl., 332, 333)

4. The witness Taylor further admitted that with reference to eight other drug stores respondent's claim covered for serum sold at the reduced price of 53¢, which according to the entries in the books, by subsequent invoices had been increased to 63¢. The witness admitted that these increases had not been taken into consideration in the preparation of the tabulation "Plaintiff's Exhibit PP". (R. 323 to 326, incl.)

5. After these facts were developed in cross-examination, respondent in open court corrected the tabulation as to one of the drug stores for which it claimed a loss on more serum than it sold, and on the eight drug stores where the price had been increased by subsequent invoices. Respondent attempted to justify the claim made with refer-

ence to the other seven drug stores on more serum than they sold to such drug stores by credit memorandums, after which respondent's witness Taylor still admitted that the respondent with reference to these seven drug stores was claiming a reduction on more serum than was sold during the period in question and that he knew nothing about the authenticity of the credit memorandums. (R. 332, 333)

6. It was after these facts were developed in the cross-examination of the witness Taylor that respondent attempted to make any correction in the original tabulation. It is only reasonable to presume that there were other exaggerations which petitioners were not able to develop in cross-examination.

7. With reference to any reduction which might have been made by the respondent in Illinois, they certainly could have been made for the same purpose for which it reduced the selling price of its serum to drug stores in Iowa.

All creditable evidence shows that petitioners' acts did not damage respondent.

1. This case was tried at Chicago, Illinois, in close proximity to the place where all of respondent's druggists and its customers, patrons and alleged members lived. Not a single druggist or patron or purported member was called as a witness. Evidently because such druggist and witness could not and would not testify that the acts of the petitioners affected the sale of respondent's serum.

2. Not a single customer, patron or purported member of the respondent ever informed the respondent that they quit buying respondent's serum because they could buy serum elsewhere cheaper. (R. 313 to 315)

3. It is admitted that neither the respondent's president nor its Assistant Sales Manager Davis ever talked to a single one of respondent's customers or purported members; that their hearsay

testimony was what the druggists had told them. (R. 313 to 315)

4. There is not any competent evidence that a single one of the thirty-six druggists to whom respondent claims to have reduced its selling price, ever sold any serum whatever to a customer at 65¢ instead of 75¢.

5. It is just as reasonable to assume that these druggists procured a reduction of their price to increase their profits as it is to assume that they actually sold the serum at 65¢.

6. Respondent's President testified that respondent was not trying to sell to or procure the County Farm Bureaus' members. (R. 280)

7. The Farm Bureaus were engaged in selling serum only to their members. (R. 461, 580, 583, 584, 586, 401, 403, 404, 406, 435, 414.) If they made any sales to non-members they would not exceed 2% and would be made by error to former members not in good standing. (R. 580, 583, 584, 468) Only farmers who were members of both the Illinois Agricultural Association and the County Farm Bureaus were eligible to purchase serum through the Petitioner Illinois and its county farm bureaus. (R. 414)

8. As Petitioner Illinois was a volume contract purchaser, and as respondent had made no filings permitting and authorizing it to sell to volume contract purchasers, respondent was not engaged in competition with petitioner Anchor in the sales made by Anchor to Illinois.

9. During the years 1936, 1937, 1938 and 1939, the County Farm Bureaus' retail price to their members was constant and remained at 65¢ to their members. (R. 402, 403, 455, 456, 484, 485, 496) This had been fixed and determined in 1935. (R. 453 to 455)

10. The moneys received by Petitioner Illinois for services, advertising, educational and promotional work rendered, in no way affected the retail price of the different county farm bureaus to their members as their patronage dividends were always

higher than the amount of such compensation. (R. 1110 to 1114 incl.)

11. According to respondent's own testimony, it only reduced the selling price of its serum to certain Illinois druggists and did not to others. (R. 284, 285, 280)

12. In fifteen counties in Illinois respondent never reduced the selling price of serum to the druggists. In each of these counties, the Farm Bureaus were operating and in six of them they were operating in the same towns. (R. 407)

13. In thirty-five of the towns in which respondent claimed to have reduced the selling price, the Farm Bureaus did not operate in twelve of these towns. (R. 411 to 413)

14. During the period in question there were over 160,000 farmers in Illinois raising hogs. (R. 485)

15. Although the County Farm Bureau units had a membership ranging from 64,000 to 75,000 members, most of whom were raisers of swine, they only sold serum to from 19,000 to 20,000 members. (R. 403)

16. During the period in question, Fidelity Laboratories, a competitor of both parties hereto, increased their Illinois sales of 1,138,000 ccs. in 1937 to 1,564,000 ccs. in 1940. (R. 514)

17. During the period in question Petitioner Anchor increased its sales through its wholesaler, at its regular posted prices, at the National Stock Yards, from 2,289,750 ccs. in 1937 to 4,185,250 ccs. in 1939;(R. 161) and Petitioner Anchor increased its sales through its dealer in Illinois from 627,225 ccs. in 1937 to 991,025 ccs. in 1940. (R. 161)

18. Petitioners offered and were denied the right to prove that respondent's Illinois sales during the period in question increased from 2,523,625 ccs. in 1937 to 4,166,125 ccs. in the fiscal year from March 1, 1939 to February 29, 1940. (R. 618, 619)

19. While petitioner Illinois' sales in Illinois from 1937 to 1940 increased approximately 39%, the respondent's Illinois sales increased 65%. (R. 618, 619, 751)

20. During the time in question there were at least forty other manufacturers of serum in competition with both the respondent and the petitioners in Illinois, and it does not appear that they claimed any loss in their Illinois sales. (R. 362)

21. The contention of respondent that the petitioners sold all of the serum consumed in Illinois is only a mirage which must fade away in the light of the truth.

22. The increase in sales realized by respondent and all other handlers during the period of time must have resulted from the large and extensive educational and promotional work conducted by the petitioner Illinois and its County Farm Bureau members.

Certainly, it must be said that if there was no jury question presented, then respondent's President Huff is both the final arbiter of the facts and the final judge of the law.

In the light of the facts disclosed by the record, we submit that:

1. The credibility of respondent's witness and the effect or weight to be given their evidence were questions to be determined by triers of fact—the jury.

2. The credibility and the effect or weight to be given respondent's records was likewise a question for the jury.

3. Clearly the question whether petitioners' purported unlawful acts damaged respondent was for determination by the jury.

4. The action of the trial court in setting aside the verdict of the jury in favor of petitioners, and in rendering judgment N. O. V. for respondent, and and the action of the majority of the Court of Appeals in affirming this judgment, denied to these petitioners their constitutional right of a trial by jury.

III.

THE HOLDING OF THE MAJORITY OF THE COURT OF APPEALS THAT SECTION 13(b) OF TITLE 15, U. S. C. A. SHIFTED THE BURDEN UPON PETITIONERS TO PROVE THAT RESPONDENT'S DAMAGE, IF ANY, WAS CAUSED OTHERWISE THAN BY THE ACTS OF PETITIONERS OF WHICH COMPLAINT IS MADE, WAS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Respondent, in its brief of resistance, on page 28 admits that Section 13(b) is applicable only to proceedings before the Federal Trade Commission. By innuendo, respondent necessarily admits that Section 13(b) has no application in actions at law with reference to the burden of proof upon the question as to whether the defendant's action damaged the plaintiff.

Respondent attempts to distract from and to cover up this grave and serious error committed by the Court of Appeals by a discussion of Section 13(a), and by further discussing wherein lies the burden of proof in a case where a defendant pleads and attempts to prove justification of a discriminatory price under the provisions of Section 13(a).

Sufficient answer to this is found in that the Court of Appeals was not discussing or deciding where lay the burden of proof where a defendant was attempting to justify a discriminatory price. On the contrary, the Court of Appeals was discussing where lay the burden of proof as to whether petitioners' alleged wrongful acts did or did not damage respondent.

In doing this, the majority opinion of the Court of Appeals expressly held that Section 13(b) was applicable to actions at law and was controlling on the court, and further that under this section, the burden was placed upon petitioners to prove that respondent's damage, if any, was otherwise caused than by the acts of petitioners. [153 Fed. 2nd 907 at 912 R. 1254] The law of this Nation has been long and well settled contrary to the lower court's holding.

In the case of *Locker* v. *American Tobacco Co.*, 218 Fed. 447 (2nd C. C. A.), the court on page 448 said:

> *"It matters not that certain of the defendants have violated the provisions of the Sherman Act unless it be proved that such acts have injured the plaintiffs and caused them damages which can be recovered in an action at law."* (Emphasis ours.)

In the case of *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156, 67 L. Ed. 183, this court, in speaking of the right of recovery under the Anti-Trust laws, on page 165 of 260 U. S. and page 188 of 67 L. Ed., said:

> *"* * * * recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture."* (Emphasis ours.)

In the case of *Beegle* v. *Thomson*, 138 Fed. (2d) 875, (7th C. C. A.), the court, in speaking upon this question, on page 881 said:

> *"The mere existence of a violation is not sufficient ipso facto to support the action, for no party may properly seek to secure something from another without allegation and proof of facts demonstrating pecuniary loss springing from or consequent upon the unlawful act."* (Citing cases.) (Emphasis ours.)

Also see cases cited and quoted in original petition and supporting brief, pages 34 to 36, inclusive.

This holding of the Court of Appeals was a grave radical and serious departure from the usual course of judicial proceedings. If it is to be followed as a precedent, it presents an important question of federal law which has not been but should be decided by this Court. It likewise presents a question of general national importance.

We therefore submit that this Court should grant writs of certiorari and correct such monstrous departure from the usual course of judicial proceeding.

IV.

THE IMMUNITY QUESTION.

The immunity question presented in the case at bar was not presented to and was not decided by this Court in the case of the *United States* v. *Borden & Company*, 308 U. S. 188, 84 L. Ed. 181. The only question decided in the *Borden case* was that the enactment itself of the Agricultural Marketing Agreement Act of 1937 created no immunity. These petitioners have never contended that the enactment of the Serum and Virus Act in itself created any immunity.

The question presented in this case is whether or not after the marketing agreement in question was entered into by the members of the serum and virus industry with the approval of the Secretary of Agriculture, and after the Secretary of Agriculture issued an order regulating the industry, and after a control agency was created and after the members of the industry filed their postings as to prices, terms of sale and discount, and after the industry was operating under the Serum and Virus Act, and

when a member of the industry sold its serum in accordance with its postings and prices, was such member immune from the Anti-trust Law or was such member subject to both the penalties of the Serum and Virus Act and the penalties of the Anti-Trust Law?

Petitioner Anchor's postings contained the provision that it spent liberal allowances for the purposes for which allowances and payments were made to petitioner Illinois. These postings were never suspended but always remained in full force and effect. As found by the Secretary of Agriculture, this provision was part of petitioner Anchor's public postings of prices, terms of sale and discount. This practice was acquiesced in by the control agency and indulged in by the other members of the industry. Even respondent's president admits that it was indulged in by the respondent.

We submit that this is an important federal question which has never been but should be decided by this Court. It is a question of general national interest affecting not only the members of the serum and virus industry but other branches of the agricultural industry operating under marketing agreements.

CONCLUSION.

This Court has always held inviolate the rights guaranteed by our Federal Constitution. This Court has in the past extended that protection to criminal aliens arrested in our country for espionage and even those citizens charged with treason.

Certainly, if a criminal alien and an unpatriotic citizen charged with treason are entitled to the constitutional protection, honest and respectable business organizations of our Nation are entitled to the same protection. We sincerely urge that there can be no doubt but what the judgment of the majority of the Circuit Court of Appeals not only deprived petitioners of their constitutional right of a trial by jury but that it deprives petitioners of their property without due process of law.

We sincerely believe that every member of this Court is thoroughly in accord with Mr. Chief Justice Marshall when he, many years ago, in the case of *Cohens* v. *Virginia*, 6 Wheat (19 U. S.) 264, at 404, 5 L. Ed. 257, at 291, said:

> "*It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.*" (Emphasis ours.)

Petitioners, believing that their constitutional guarantees have been denied them by the decisions of the lower courts, come to the only court whose doors remain open for relief.

Petitioners come to the door of the court created by our constitution for the protection of the wronged and oppressed.

We submit that this Court should vacate its order of October 14, 1946 denying the original petition and should grant the writs of certiorari as prayed in the original petition and supporting brief upon all the questions involved.

Respectfully submitted,

CLARENCE G. MYERS,
CHARLES F. SNERLY,
J. EUGENE LOEB,
BEN PHILLIP,
Attorney for Petitioner
Anchor Serum Company

I hereby certify that the foregoing petition is presented in good faith and not for delay.

Clarence G. Myers

CLARENCE G. MYERS

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

Nos. 185-186

ANCHOR SERUM COMPANY, a corporation of Missouri,

vs. *Petitioner,*

AMERICAN COOPERATIVE SERUM ASSOCIATION, a corporation of Iowa,

Respondent.

ILLINOIS FARM BUREAU SERUM ASSOCIATION, a corporation of Illinois,

Petitioner,

vs.

AMERICAN COOPERATIVE SERUM ASSOCIATION, a corporation of Iowa,

Respondent.

Petition of Illinois Farm Bureau Serum Association for Rehearing of Petition for Writs of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

DONALD KIRKPATRICK,
HARRY MELOY,
PAUL E. MATHIAS,
Attorneys for Petitioner, Illinois Farm Bureau Serum Assn.

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Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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CASES CITED.

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Petition of Illinois Farm Bureau Serum Association for Rehearing of Petition for Writs of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT.

This is a petition for rehearing of a joint petition for writs of certiorari, filed by this petitioner and petitioner Anchor Serum Company, which was denied on October 14, 1946.

This denial of petition for writ of certiorari has deprived this petitioner of its constitutional right to a trial by jury. Petitioner cannot believe that this Court has fully considered this particular effect of its order of denial. There were seven questions presented in the original petition and we fear that this Court has entered its order of denial upon the basis of its opinion with respect to what it may have considered the more important questions presented.

Effect of Denial.

The effect of this order of denial is a complete reversal of the great body of the law relating to right of trial by jury in suits under the Anti-trust Laws and to allow an unprecedented decision in this respect to become the law of the land. This, we think, this Court did not intend.

Proceedings in Courts Below.

This was an action brought by respondent in the District Court of the United States to recover triple damages for alleged violations of the Anti-trust Laws. (R. 63 to 69, inclusive; R. 2 to 11, inclusive.) The case was tried before a jury and the jury returned a verdict finding the petitioner and Anchor Serum Company not guilty of damaging the respondent. (R. 1163.) The District Court judge set aside this verdict and did not simply order a new trial, but entered judgment for the respondent in an aggregate amount of $20,166.10. (R. 641, 1165, 1166.) The Circuit Court of Appeals for the Seventh Circuit (one judge dissenting) affirmed the District Court but did reduce the amount of the judgment to $13,347.93 plus attorney's fees ($2,500.00 having been allowed by the District Court). (R. 1247 to 1269, inclusive.)

Reasons Relied Upon for Rehearing.

This court has said in *Fleitmann* v. *Welsbach Street Lighting Company,* 240 U. S. 27, 60 L. Ed. 505, where an action was brought to recover triple damages under the Sherman Act:

> "* * * When a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through a verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other. * * *" (Page 29, 240 U. S.; page 507, 60 L. Ed.)

There were many questions of fact at issue in this case. The question of whether this petitioner had knowledge that the allowances it received were discriminatory; the question of whether the respondent was actually in competition with petitioner; the question of whether the respondent was compelled to reduce its prices or was in any way damaged by the acts complained of—to mention only a few—were vital and important questions for determination by a jury. Yet 20,000 farmers (Tr. 403) in the State of Illinois, organized into a non-profit agricultural cooperative association (Tr. 392, 719 to 722, inclusive) find themselves ordered to pay a money judgment for triple damages under the Anti-trust Laws to a party that a common law jury says has not been damaged. (R. 1163.) The cooperative association owned by these farmers has not had any issue of fact decided against it by a jury but a Federal District judge has taken all fact questions from the jury (with a Federal Circuit Court of Appeals in a divided opinion affirming) without regard to the right of petitioner under the 7th Amendment to the Constitution of the United States to have questions of fact tried by a jury.

An exhaustive search of decisions reveals no case where a judgment for a plaintiff for unliquidated damages under the anti-trust laws has ever been permitted to stand when entered contrary to and notwithstanding the verdict of a jury for a defendant. In such cases where the verdict has been for the defendant, the power of the Court would seem to be limited to the awarding of a new trial.

The right to trial by jury is one of the oldest concepts of personal liberty in our system of general jurisprudence. It is a basic and fundamental feature of our system of federal jurisprudence. It is a right so fundamental and sacred to the citizen that this Court has always guarded it with jealousy. These propositions are so elemental that they require no supporting citations.

In this case there is a patent difference of opinion between reasonable men as to the effect of the evidence and the inferences to be drawn therefrom. One judge of the Circuit Court of Appeals for the Seventh Circuit has written an opinion stating that in this case a verdict should have been directed for this petitioner and Anchor Serum Company and at the least the verdict of the jury should have been accepted. (153 Fed. (2d) 915 to 918, R. 1259 to 1267.)

We respectfully submit that the denial to petitioner of its constitutional right to trial by jury is of gravity and general importance and that in affirming the judgment of the District Court the Circuit Court of Appeals has sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The decision of the Circuit Court of Appeals has already attracted widespread attention. Requests have been received by counsel from law schools, publishers of law reviews and attorneys specializing in anti-trust law for copies of our briefs and copies of the record.

If the decision of the Circuit Court of Appeals for the Seventh Circuit is permitted to become law it can only mean that from this day forward defendants in actions for triple damages under the anti-trust laws as well as in other tort actions have only a phantom right under the Constitution to trial by jury or that such right may be nullified and denied by any judge who chooses to disagree with the findings of the jury and arbitrarily enter judgment for the plaintiff notwithstanding the verdict of the jury. It must mean this, for this is precisely the effect of the decision of the Circuit Court of Appeals in this case. This is something new in American jurisprudence and a grave encroachment upon the constitutional rights of our people.

Conclusion.

We still earnestly believe that the other questions presented in the original petition for writs of certiorari furnish adequate and sufficient reasons for granting the writs of certiorari, but for sake of emphasis upon the grave constitutional question referred to herein we forsake in this petition any further plea with respect to such questions.

We respectfully pray that this Court reconsider its denial of October 14, 1946, and grant the petition for writs of certiorari.

Respectfully submitted,

DONALD KIRKPATRICK,
PAUL E. MATHIAS,
HARRY MELOY.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

PAUL E. MATHIAS.